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914
No. 2455

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY,
a corporation, J. THORBURN ROSS, GEORGE H.
HILL, T. T. BURKHART, JNO. E. AITCHISON
and F. M. WARREN,

Defendants,

MULTNOMAH COUNTY, OREGON, et al

Intervenors, Respondents,

R. S. HOWARD, Jr., Receiver,

Appellant.

**Appeal from the District Court of the United
States for the District of Oregon.**

TRANSCRIPT OF RECORD.

Filed

JUL 31 1914

F. D. Monckton,
Clerk.

No.

IN THE

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NINTH CIRCUIT

N. COY,

Complainant,

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THE TITLE GUARANTEE & TRUST COMPANY,
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THE TITLE GUARANTEE & TRUST COMPANY,
a corporation, J. THORBURN ROSS, GEORGE H.
HILL, T. T. BURKHART, JNO. E. AITCHISON
and F. M. WARREN,

Defendants,

MULTNOMAH COUNTY, OREGON, et al

Intervenors, Respondents,

R. S. HOWARD, Jr., Receiver,

Appellant.

**Names and Addresses of Attorneys
upon this Appeal:**

For Appellant:

W. C. Bristol,

Wilcox Bldg., Portland, Oregon

For Respondents:

Emmons & Webster,

Chamber Commerce, Portland, Oregon

W. H. Evans, District Attorney,

Portland, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 6 day of November,
1907, there was duly filed in the District Court of
the United States for the District of Oregon, a
Bill of Complaint in words and figures as fol-
lows, to wit:

[Bill of Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a Corporation, J. THORBURN
ROSS, GEORGE H. HILL, T. T. BURK-
HART, JOHN E. AITCHISON, and F. M.
WARREN,

Defendants.

The Bill of Complaint of the Complainant, N. Coy,
a citizen and resident of the State of Massachusetts,
against the defendants above named, The Title Guar-
antee & Trust Company, a corporation, J. Thorburn
Ross, George H. Hill, T. T. Burkhart, John E. Aitch-
ison and F. M. Warren, citizens and residents of the
State of Oregon.

To the Judges of the Circuit Court of the United
States for the District of Oregon:

The complainant above named, N. Coy, complain-
ing on behalf of himself and of all other stockhold-
ers and creditors of the Defendant corporation, The

Title Guarantee & Trust Company, similarly situated who shall in due time appear and seek relief and pay and contribute to the expenses of this suit, brings this his Bill of Complaint against the Defendants above named, The Title Guarantee & Trust Company, J. Thorburn Ross, George H. Hill, T. T. Burkhart, John E. Aitchison and F. M. Warren, and thereupon and as and for such Bill your Orator, the said Complainant, now shows and alleges:

That your Orator is now and has been for many years past a citizen and resident of the State of Massachusetts; that the Defendant, The Title Guarantee & Trust Company, is a corporation duly incorporated and organized under the laws of the State of Oregon and has been such a corporation for more than ten years last past and is a citizen and resident of the State of Oregon, and the Defendants, J. Thorburn Ross, George H. Hill, T. T. Burkhart, John E. Aitchison and F. M. Warren are each and all of them citizens of the State of Oregon and residents therein.

II.

That the defendant, The Title Guarantee & Trust Company, has been ever since the incorporation and organization thereof and for more than ten years last past, a banking corporation existing under the laws of the State of Oregon, engaged in and conducting a banking business in the City of Portland, receiving deposits, making loans, acting in various fiduciary capacities and transacting business usually appertaining to banks, banking and trust corporations, including in its said business the owning, conducting, oper-

ating and maintaining safety deposit vaults and boxes and abstracts of title; That the Defendants, J. Thorburn Ross, George H. Hill, T. T. Burkhart, John E. Aitchison and F. M. Warren are and have been for some time past directors of the Defendant corporation and are stockholders therein and hold, own and control a very large proportion of the stock of said The Title Guarantee & Trust Company, and said Defendants have been and still are conducting and managing the business of said banking corporation; that the said corporation has, owns, and possesses assets and property consisting of bonds, notes, cash, real estate, mortgages, bank fixtures, abstracts and chains of title, safety deposit boxes and vaults and other properties, including the lease of the premises occupied by said banking corporation in the City of Portland, of the value of about \$2,500,000.00; That said Defendant corporation at this time is indebted to various persons, firms, corporations and banks and has liabilities outstanding against it as follows:

| | |
|---|-----------------|
| Demand deposit, aggregating the sum of | |
| about | \$ 1,130,000.00 |
| Savings deposits due and payable on 60 | |
| days demand, about | 410,000.00 |
| Time certificates of deposit, about..... | 175,000.00 |
| Demand certificates of deposit, about.... | 315,000.00 |
| Moneys due various banks and banking | |
| institutions, about | 610,000.00 |
| Making a total indebtedness and liability | |
| of said Defendant corporation of | |
| about | 2,640,000.00 |

That of the property and assets of said bank at the time of the commencement of this suit there was in cash in the possession of said Defendant bank only an inconsiderable sum, the precise amount your Orator could not learn, available for the payment to depositors of the moneys due them and subject to be called for and for the payment of the other liabilities of said bank and to enable it to conduct and transact its current business; that the capital stock of said corporation is \$250,000.00, the whole of which amounting to \$250,000.00 has been subscribed and paid for.

III.

Your Orator further alleges that he is now and has been for some time prior to the commencement of this suit a stockholder of the Defendant bank owning and holding 592 shares of the capital stock thereof.

IV.

Your Orator further alleges that of the liabilities of said Defendant bank there is due and payable on demand to depositors and other creditors of said bank the sum of \$1,500,000 and over; that the business of said banking corporation has been continued up to the present time, but owing to the feverish condition of the financial world and the unrest and uncertainty which has largely developed within the past few weeks, large demands of the moneys kept in reserve by the Defendant bank for the purpose of meeting the requirements of its depositors and paying the liabilities of the Defendant bank have been withdrawn from said bank and said Defendant bank has not now sufficient cash, other resources assets or available

means, nor can it obtain the same, with which to continue its business or to liquidate its said indebtedness and meet the obligations from time to time required to be met in the ordinary course of its business.

Your Orator further alleges that because of the disordered condition of the times and the stringency in the money market and a lack of confidence in property values, the selling value or the amount that could be realized upon the securities and assets of the Defendant bank has largely depreciated.

V.

Your Orator further alleges that late Monday afternoon or evening, October 28th, 1907, by reason of the conditions hereinbefore recited, the Governor of Oregon declared a legal holiday for five days and again, at the expiration of said period has declared another holiday and at the present time no business can be transacted by the Defendant bank.

Your Orator further alleges that owing to the present condition of affairs the directors and officers of the Defendant, The Title Guarantee & Trust Company, all of whom are Defendants to this suit, have concluded and determined that said bank is unable to continue its business and that said bank cannot reopen its doors and said directors and officers of the Defendant bank are unwilling to longer continue in the control and management and conduct of said Defendant bank, and your Orator avers the fact to be that said Defendant bank cannot safely continue or attempt to continue its said business for want of sufficient money and available resources so to do.

VI.

Your Orator alleges that at the time of the commencement of this suit and just prior thereto, the Defendant banking corporation aforesaid was and it is now seriously embarrassed and in straitened circumstances, and is unable to carry on and continue its business and finds itself without adequate funds to pay its depositors the moneys due them and demanded, and a large number of actions and suits by attachment and otherwise are about to be commenced and prosecuted by various and numerous depositors and creditors of the Defendant bank; that the resources and assets of said Defendant bank are insufficient according to the present valuation thereof, largely the result of existing financial conditions, to pay off and discharge the obligations and liabilities of the Defendant bank.

That if the property and assets of the Defendant bank remain in the possession of said Defendant bank and subject to seizure and levy under attachment by the depositors and creditors of said bank upon their several claims, a general demoralization of the affairs and property of the Defendant bank will result therefrom, the property and assets of the Defendant bank largely dissipated and wasted in expensive litigation with its attendant costs and expenses; that much vexatious litigation against said Defendant Bank has been threatened and such threatened litigation will be accompanied by attachments and seizures which will give to those depositors and creditors prosecuting such litigation an undue and unfair advantage over

other depositors and creditors of the Defendant bank who are unable to or do not see fit to harrass and embarrass the Defendant corporation with such litigation, and some of the depositors and creditors of said bank might realize upon their said claims and a great majority in number and amount of the depositors and creditors of said Defendant bank would thereby wholly lose their claims and demands against said Defendant bank and nothing be realized by them thereon.

That the prosecution of such attachment suit and litigation threatened will tend largely to dissipate the assets of said Defendant bank, prevent an even and ratable division among the depositors and creditors of said bank of the assets thereof and will cause great loss to such depositors and creditors.

That the condition of the said Defendant bank is such that the winding up of said corporation and the division of its assets along the creditors of said Defendant bank is necessary.

That it is impracticable for the Defendant corporation to make a general assignment for the equal benefit of its creditors under the provisions of the general assignment laws of the State of Oregon for the reason that the bond required of the assignees will be very large one and difficult to procure and for the further reason that the assets of the said bank cannot be as well or as satisfactorily protected, conserved and distributed among the parties entitled thereto as can be done by a receiver appointed by this honorable court.

VII.

Your Orator further alleges that if said property and assets of the said Defendant bank were taken possession of and conserved under the order and direction of this honorable Court, and a receiver appointed by this Court to take charge of said property and assets and convert the same into cash and distribute the same pro rata among the depositors and creditors of said Defendant a large portion, if not the entire amount of the total indebtedness and liabilities of said Defendant bank will be paid to said depositors and creditors; that the bulk of the property and assets of the Defendant banking corporation including moneys on hand, bonds, bills receivable and other property and assets constitute a special fund out of which the depositors of said The Title Guarantee & Trust Company are entitled to satisfaction of their demands; that the appointment of a receiver to take charge of and protect the property and assets of the Defendant corporation and convert the same into cash and distribute the same among the depositors and creditors of said Defendant bank according to their respective interests therein is necessary and advisable and the only way to prevent the institution and prosecution of many suits and actions against the Defendant bank and by means of which a race of diligence between the depositors and creditors can be avoided, a large amount of costs and expense incident upon such litigation obviated, and the destruction and dissipation of the property of said bank prevented. That unless this honorable Court in the exercise of its equity powers

shall interfere and protect and preserve the property and assets of the Defendant bank and appoint a receiver who shall take possession of the same and handle and dispose of the property and assets of said Defendant bank under the direction of the Court and decree a distribution of the proceeds thereof as equity shall require the said property and assets will be in great danger of destruction and dissipation and most of the creditors and depositors of said Defendant bank will be unable to realize upon any part of their claims and demands.

VIII.

That the matter in controversy in this suit exceeds the sum and value of \$2000.00, exclusive of interest and costs.

IN CONSIDERATION WHEREOF, and for as much as your Orator is remedyless in the premises at and by the strict rules of common law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, to the end therefore that said Defendants may appear and answer all and singular the matters and things hereinbefore set forth and complained of but not on oath, the answer under oath being waived by your Orator, may it please your Honors to grant unto your Orator the relief herein prayed for, viz: a decree of this honorable Court requiring the Defendants and each of them to answer the allegations and charges herein made; that this Court in the exercise of its equity powers take possession of the property and assets of said Defendant, The Title Guarantee & Trust Com-

pany, and appoint a receiver herein to protect and conserve and manage the assets of said banking corporation, acting under the orders and direction of this honorable Court to the end that there may be collected and converted into cash the property and assets of the Defendant corporation and that this Court will cause the same to be distributed pro rata among the depositors and creditors of said Defendant corporation, or according to the interests that they may have therein; that your Orator and all persons who may make themselves parties to this suit and contribute to the expenses of maintaining and prosecuting the same, be granted the relief or decreed payment of the moneys due them as depositors and creditors out of the property and assets of the Defendant bank; That the Defendants and each of them and the officers, agents and employees of the Defendant corporation be enjoined and restrained from making any disposition of or interfering with the property and assets of the said corporation and that the Court award your Orator and all others making themselves parties hereto such other and further relief as may be meet and proper in a Court of Equity.

May it please your Honors to grant unto your Orator a writ of subpoena to be directed to said Defendants, and each of them, commanding them and each of them at a certain time and under certain penalty therein to appear before this honorable Court and then and there full, true, direct and perfect answer make, but not on oath, to all and singular the premises and further to stand and perform and obey such further

order, direction and decree therein as to this honorable Court shall seem agreeable to equity and good conscience.

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Complainant.

District of Oregon, ss:

I, Joseph Simon, being first duly sworn, say on oath that I am one of the attorneys for the Complainant in the above entitled suit; that I have read the foregoing Bill of Complaint and know the contents thereof, and that the facts therein contained are true as I verily believe.

Joseph Simon.

Subscribed and sworn to before me this day of November, 1907.

(SEAL) Chester V. Dolph,
Notary Public for Oregon.

[Endorsed]: Bill of Complaint. Filed November 6, 1907.

J. A. SLADDEN,
Clerk.

And afterwards, to wit, on the 6 day of November, 1907, there was duly filed in said Court, an Appearance, in words and figures as follows, to wit:

[Appearance of Defendants.]

*In the Circuit Court of the United States for the
District of Oregon.*

N. COY,

Plaintiff.

vs.

THE TITLE GUARANTEE & TRUST COMPANY, a Corporation, J. THORBURN ROSS, GEORGE H. HILL, T. T. BURKHART, JOHN E. AITCHISON and F. M. WARREN,

Defendants.

We, the undersigned, Defendants in the above entitled suit hereby acknowledge due and personal service upon us, and each of us, of the Bill of Complaint in the above entitled suit, and the subpoena issued in pursuance thereof by delivery to each of us of a duly certified copy of said Bill of Complaint and subpoena at Portland in the District of Oregon on this 6th day of November, 1907.

We also enter our appearance in this suit and consent to the application of the Complainant for the appointment of a Receiver as prayed for in the said Bill of Complaint.

The Title Guarantee & Trust Co.,
By J. Thorburn Ross, President.

J. Thorburn Ross

George H. Hill

T. T. Burkhart

Wm. A. Munley

Attorney for all of said defendants except F. M. Warren.

[Endorsed]: Appearance of Defendants. Filed
Nov. 6, 1907.

J. A. SLADDEN,
Clerk.

And afterwards, to wit, on the 25 day of July, 1913, there was duly filed in said Court, a Petition in Intervention, in words and figures as follows, to wit:

**[Petition in Intervention by Multnomah County
et al.]**

*In the District Court of the United States for the
District of Oregon, Ninth Judicial Circuit
In Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY, a Corporation, J. THORBURN ROSS, GEORGE H. HILL, T. T. BURKHART, JOHN E. AITCHISON and F. M. WARREN,

Defendants.

In the Matter of the Insolvency and Receivership of the Title Guarantee & Trust Company.

No. 3209.

Intervention of the County of Multnomah, Oregon, and R. L. Stevens, Sheriff and ex-officio Tax Collector for Multnomah County, Oregon.

Now comes the County of Multnomah, Oregon, and R. L. Stevens, Sheriff and ex-officio Tax Collector for Multnomah County, Oregon, by their attorneys and respectfully represent to this honorable Court that they have an interest in and a preferred claim and

lien upon all the property and funds in the possession and under the control of the receiver herein, and pray that they, and each of them may be allowed to intervene in and become parties to the above entitled cause, and for cause of intervention your petitioners respectfully represent :

I.

That said petitioner, Multnomah County, Oregon, is and at all the times hereinafter mentioned was, a quasi-municipal corporation organized and existing under the laws of the State of Oregon as a political division and county thereof, and the said petitioner, R. L. Stevens is and at all the times hereinafter mentioned was the duly elected, qualified and acting Sheriff and ex-officio Tax Collector of and for said County of Multnomah.

II.

That on the 6th day of November, 1907, a receiver was duly and regularly appointed by this court to take charge of all the property, real, personal and mixed, of the above named Title Guarantee & Trust Company, and said receiver immediately thereafter duly qualified and entered upon the discharge of his duties as such receiver and thereupon took possession of all of said property and ever since has been and still continues in the possession and charge of said property.

III.

That for the years 1907, 1908, 1909 and 1910 taxes were duly and regularly assessed and levied for the support of the government of this State including

taxes levied for said county, municipal and other purposes upon and against the personal property so held and in the charge of said receiver under the direction of this court, but such taxes, with the exception of those assessed and levied for the year 1907, have not been paid; that the taxes remaining unpaid at this time, together with the legal penalty and interest thereon by reason of the delinquency in the payment thereof are as follows:

| | |
|-------------------------|------------|
| For the year 1908 | \$1,890.80 |
| For the year 1909 | 993.50 |
| For the year 1910 | 1,104.75 |

IV.

That said taxes, together with interest and penalty thereon, amounting at this time to the sum of \$3,-989.05, are a first and prior lien and claim upon all of the property in the hands of said receiver.

WHEREFORE your petitioners pray that the honorable Court may enter an order allowing your petitioners to intervene and become parties to this cause, and that an order be entered commanding the receiver herein to forthwith pay to your petitioners the full amount of the taxes assessed and levied upon the property in said receiver's hands, which are now delinquent, together with all the interest and penalty which has accrued thereon, and that your petitioners may have such other and further relief as may be agreeable to equity and for the costs of this intervention.

Emmons & Webster,
Attorneys for Petitioners.

[Endorsed]: Intervention of Multnomah County and R. L. Stevens, Sheriff and ex-officio Tax Collector. Filed March 11, 1912.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 4 day of April, 1912, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer of Receiver to Petition in Intervention.]

*In the District Court of the United States
in and for the District of Oregon
Ninth Judicial Circuit
in Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY, a Corporation, J. THORBURN ROSS, GEORGE H. HILL, T. T. BURKHART, JOHN E. AITCHISON and F. M. WARREN,

Defendants.

In the Matter of the Insolvency and Receivership of
The Title Guarantee & Trust Company.

No. 3209.

Answer of R. S. HOWARD, Jr., Receiver, to the Petition in Intervention of Multnomah County, R. L. Stevens, Sheriff and Ex-Officio Tax Collector thereof in the State of Oregon.

TO THE HONORABLE JUDGES OF THE
ABOVE ENTITLED COURT:

The answer of R. S. Howard, Jr., receiver, to the petition in intervention of the County of Multnomah and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, doth respectfully deny, admit, allege and represent:—

This receiver denies that the County of Multnomah and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in and for the State of Oregon, has had or ever did have since and after the 6th day of November, 1907, a lien or claim, preferred or otherwise, upon any of the property or funds in the possession or under the control of the receiver herein; and this receiver in connection with said denial excepts to the said petition in intervention of said County of Multnomah and R. L. Stevens, Sheriff and *ex-officio* Tax Collector thereof in the State of Oregon, for insufficiency in this behalf, to-wit, that as matter of law on and after the 6th day of November, 1907, no property or funds or assets in the possession of the receiver were subject to taxation, for that the same were on that date and ever since have been and are now *in custodia legis* in the proceedings in this court in the above entitled cause for the liquidation and winding up of The Title Guarantee & Trust Company.

This receiver admits all of Paragraph I of said pretended petition in intervention, without conceding or admitting that a petition in intervention doth properly lie herein, and without admitting or conceding

that Multnomah County or R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, hath or should have any right, title or claim to satisfy or proceed for in respect of taxes, as alleged in said petition in intervention, in any court, and this receiver denies that Multnomah County or R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in said State of Oregon, hath any such right, either to tax or proceed for a tax, since the 6th day of November, 1907.

This receiver admits all the matters and things alleged in Paragraph II of said pretended petition in intervention, consisting of lines 9 to 17 on page 2 thereof.

This receiver denies that Multnomah County, acting through its officers, did attempt to assess, levy and charge against personal property in the possession of this receiver, as alleged in Paragraph III in said pretended petition in intervention, the taxes therein specified and set forth for the purposes therein specified and set forth, and admits that none of the said alleged pretended taxes have been paid, but admits that the tax regularly assessed for 1907 and which accrued and was properly a preferred claim and lien for taxes and which accrued prior to the 6th day of November, 1907, was duly paid; that as to whether or not the amounts for the years 1908, 1909 and 1910, as specified in said Paragraph III, are the amount of taxes assessed and levied, this receiver hath no knowledge or information sufficient to form a belief, and therefore denies the same, calling for proof in that particu-

lar; but this receiver expressly denies that any taxes for the years 1908, 1909 or 1910 were duly or at all or ever regularly or at all or ever assessed or levied upon and against the personal property so held and in the charge of the receiver herein under direction of this court.

This receiver denies each and every matter and thing stated and alleged in Paragraph IV in said pretended petition in intervention, lines 5 to 8, page 3 thereof, and every part of the same and the whole thereof; and doth deny that any of said sum whatever arising as alleged is or can be a first or prior or any lien or claim upon any of the property in the hands of this your receiver.

And in and about the matters and things in said pretended petition in intervention on behalf of Multnomah County and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, alleged, this receiver doth say that all of the officers of Multnomah County as well as said R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof, at all times knew and were informed that on and after the 6th day of November, 1907, all of the property and assets of The Title Guarantee & Trust Company came into the custody of the United States Circuit Court in and for the District of Oregon then sitting; afterwards and now the above entitled court by virtue of the act approved and passed March 3, 1911, by the Congress of the United States, and that at the time of the purported levies and assessments said property then was and ever since has been and now is in the custody of said court

and under the administration of the law and procedure thereof being administered upon in proceedings to liquidate and wind up the Title Guarantee & Trust Company.

That all of said property against which said pretended assessment, levy and lien are charged to exist and are alleged to have been made consists of and was personal property estimated by the Assessor of Multnomah County to be then in possession of The Title Guarantee & Trust Company, whereas in truth and in fact the said Assessor, B. D. Sigler of Multnomah County, then well knew and knows now that all of the personal property against which assessment was made and said pretended tax asserted and levied was personal property in the custody of the law in the possession of this court in the liquidation and winding up of The Title Guarantee & Trust Company, and not otherwise owned or possessed.

That all of said personal property against which said pretended tax for the years 1908, 1909 and 1910 is alleged to have been levied and made was and is held by said receiver for the benefit of a large and multitudinous number of creditors, savings depositors and general claimants of The Title Guarantee & Trust Company, the major part of whom, if not all, as to which this receiver for the obvious reason of the multitudinous number of the same cannot specify in particular, were assessed in their own names and right for personal property taxes in respect of the amounts of personal property then held by them and being liquidated and wound up in these proceedings for the bene-

fit of said creditors; that Multnomah County and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof, has received and obtained from said persons their due proportion of personal property tax; that to assert and claim against the receiver for the years 1908, 1909 and 1910 accordingly further tax upon personalty is double, excessive, non-uniform taxation without warrant of law.

That American Surety Company of New York, a large claimant in the personal property and assets of The Title Guarantee & Trust Company, paid to the State of Oregon vast sums of money in liquidation of the State of Oregon claims arising in The Title Guarantee & Trust Company transactions conducted by it with respect to State moneys, and by the payment thereof became subrogated to and stood in the place of a large number of claims and demands against The Title Guarantee & Trust Company which are the subject of the taxation alleged in the pretended petition in intervention for the very years of 1908, 1909 and 1910, in addition to which said American Surety Company of New York paid its tax to the said State of Oregon as required by law for and in respect of the business done by it in said State and upon the subrogated demands arising by reason of the aforesaid transactions.

That likewise William M. Ladd, intervenor herein and petitioner by virtue of his agreements of guaranty for allowed and approved claims of depositors against The Title Guarantee & Trust Company, including savings deposits and other accounts, himself paid and discharged personal property taxes for the years specified

in the alleged petition in intervention upon moneys, accounts and demands all of them severally included in the subrogations arising to him by reason of the advances of money under said guarantees for the benefit of the depositors of said Title Guarantee & Trust Company, as more particular reference to the records of the court herein in these proceedings will specifically show, said reference being now thereunto had.

That over and beyond these particular instances large numbers of other persons too numerous to mention and whom this receiver cannot particularly specify likewise, as hereinbefore generally alleged, paid personalty taxes upon personal property arising from and out of the affairs of The Title Guarantee & Trust Company in their particular names assessed.

That Multnomah County and R. L. Stevens, Sheriff and *ex-officio* Tax Collector thereof in the State of Oregon, should not now be allowed or heard to allege and say that an alleged or pretended independent assessment and levy against personal property in the possession of said receiver could or should be collected from, or was a preferred or prior or first or any lien whatsoever upon property, funds and assets now in the possession of said receiver.

And in this behalf this receiver further presents and alleges that upon all realty found as part of the assets of The Title Guarantee & Trust Company and upon which the burden and expense of raising revenue for the government of the State and municipalities of Oregon were properly and duly assessed giving taxation at the rate and in the amount and for the times speci-

fied in said alleged petition in intervention, said taxes were duly paid.

But forasmuch as this is and was a proceeding for the liquidation and winding up of The Title Guarantee & Trust Company, all of the personal property and transitory assets of the said Title Guarantee & Trust Company came in and within the exclusive administration of this court and, as aforesaid, the custody of the law, and there was no person other than those entitled to receive the same against whom any personal property tax could be assessed.

The personal property taxes in the State of Oregon are under the laws of taxation and revenue in said State, and were for the years 1908, 1909 and 1910, assessable and leviable only against the person, i. e., *in personam* and not *in rem*.

That the pretended assessments for 1908, 1909 and 1910 of personal property tax against said receiver, if made as alleged in said petition in intervention of the said County of Multnomah and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, were illegal and void.

WHEREFORE, your receiver prays that he may be relieved of and from the entry of an order herein requiring your receiver to pay the amount of said alleged taxes or the claimed interest or the claimed penalty thereon, or of any order whatever herein other than one denying the petitioners the alleged right which they claim herein, and that the petition in intervention herein be dismissed, and that the petitioners in intervention be denied any other, further or differ-

ent relief, and that this receiver be as to said petition in intervention dismissed without day, and that he have his costs herein.

R. S. HOWARD, Jr.,
Receiver.

W. C. BRISTOL,
Counsel for Receiver.

[Endorsed]: Answer. Filed April 4, 1912.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 8 day of May, 1913, there was duly filed in said Court, a Petition in Intervention, in words and figures as follows, to wit:

[Petition in Intervention by Multnomah County.]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,
District of Oregon.—ss:

PETITION—3209

N. COY,

vs.

TITLE GUARANTEE & TRUST CO., Et al.

Comes now the City of Portland, County of Multnomah and State of Oregon, by Walter H. Evans, District Attorney for the Fourth Judicial District of the State of Oregon, and represents to the above entitled court and to its officers and agent the Receiver of the Title Guarantee and Trust Company, that the said

Title Guarantee and Trust Company is indebted to the City of Portland, to the County of Multnomah and to the State of Oregon, on account of personal taxes as follows, to-wit:—

| | |
|---|-----------|
| Personal Taxes year 1908..... | \$1304.00 |
| Penalty for non-payment | 130.40 |
| and interest at rate of 12% from April 6th, 1909 until paid. | |

| | |
|---|--------|
| Personal Taxes year 1909 | 747.00 |
| Penalty for non-payment | 74.70 |
| and interest at rate of 12% from April 5th, 1910 until paid. | |

| | |
|---|--------|
| Personal Taxes for year 1910 | 913.00 |
| Penalty for non-payment | 91.30 |
| and interest at rate of 12% from April 4th, 1911 until paid. | |

| | |
|--|-----------|
| Personal Taxes for year 1911 | \$1012.60 |
| Penalty for non-payment | 101.26 |
| and interest at rate of 12% from April 2nd, 1912, until paid. | |

That a statement of said delinquent taxes is attached hereto and marked exhibit "A," hereby referred to and made a part hereof. That the same is verified by the affidavit of E. S. Huckabay, Chief Deputy in the Tax Collecting Department of the Sheriff's Office, Multnomah County, Oregon.

Petitioner prays an order of Court directing the Receiver of the above entitled Company to pay unto the

Tax Collector of Multnomah County, Oregon, the full sum due on account of said taxes, including penalties and interest thereon.

WALTER H. EVANS,

District Attorney in and for
The Fourth Judicial District,
County of Multnomah, State
of Oregon.

AFFIDAVIT.

STATE OF OREGON,
County of Multnomah.—ss:

I, E. S. Huckabay, being duly sworn, depose and say that I am Chief Deputy in the Office of the Tax Collector for Multnomah County, Oregon, that I have prepared the tax statements attached to the affidavits showing the delinquent taxes due from the Title Guarantee and Trust Company, for the years 1908, 1909, 1910 and 1911, and that the statements hereto attached are true statements of the taxes and penalties due from the said Title Guarantee and Trust Company for the years 1908, 1909, 1910 and 1911, and that the full amounts thereon stated are due and owing and no part of the same has been paid.

E. S. HUCKABAY.

Subscribed and sworn to before me this the 8th day of May, A. D. 1913.

(Seal)

S. S. LAMONT,
Notary Public for Oregon.

[Exhibit "A".]

DELINQUENT TAX

This statement must be returned when taxes are paid.

Portland, Ore., April 25th, 1913.

Title Guarantee & Trust Co.

Dr. to Multnomah County

For State, State School, County, Road, Port of Portland, and School District Taxes for the year 1908 and City of Portland Taxes for the year 1909 on the following described property:

| No. of | | | | Descrip- tion | Total Value | Amount of Tax |
|------------------|---------------|------|------|------------------|----------------|------------------|
| Certifi- cate | Sch. dist. | Page | Line | | | |
| Del. | 65200 | 6782 | 16 | Personal Tax | 65200 | 1304.00 |
| | | | | Penalty | | 130.40 |
| | | | | | | <hr/> |
| | | | | | | 1434.40 |

Interest 12 % per annum from 1st Monday of April 1909 to date of payment.

Postage stamps and checks of non-residents not received in payment of taxes. Remit by Bank Draft, Express or Postoffice Money Order, payable to T. M. Word, Sheriff.

Address all communications to

T. M. WORD, Tax Collector,
Portland, Oregon.

DELINQUENT TAX

This statement must be returned when taxes are paid.

Portland, Ore., April 25th, 1913.

Title Guarantee & Trust Co.

Dr. to Multnomah County

For State, State School, County, Road, Port of Portland, and School District Taxes for the year 1909 and City of Portland Taxes for the year 1910 on the following described property:

| No. of | | | | | | | |
|----------|-------|------|------|--------------|-------|--------|--------|
| Certifi- | Sch. | | | Descrip- | Total | Amount | |
| cate | dist. | Page | Line | tion | Value | of Tax | |
| Del. | 41500 | 6708 | 46 | Personal Tax | 41500 | 747.00 | |
| | | | | Penalty | | 74.70 | |
| | | | | | | | <hr/> |
| | | | | | | | 821.70 |

Interest at 12% per annum from 1st Monday of April 1910 to date of payment.

Postage stamps and checks of non-residents not received in payment of taxes. Remit by Bank Draft, Express or Postoffice Money Order, payable to T. M. Word, Sheriff.

Address all communications to

T. M. WORD, Tax Collector,
Portland, Oregon.

DELINQUENT TAX

This statement must be returned when taxes are paid.

Portland, Ore., April 25th, 1913.

Title Guarantee & Trust Co.

Dr. to Multnomah County

For State, State School, County, Road, Port of

Portland, and School District Taxes for the year 1910 and City of Portland Taxes for the year 1911 on the following described property:

No. of

| Certifi- cate | Sch. dist. | Page | Line | Descrip- tion | Total Value | Amount of Tax |
|------------------|---------------|------|------|------------------|----------------|------------------|
| Del. | 41500 | 6782 | 45 | Personal Tax | 41500 | 913.00 |
| | | | | Penalty | | 91.30 |
| | | | | | | <hr/> 1004.30 |

Interest 1% per mo. from 1st Monday of Apr. 1911 to date of payment.

Postage stamps and checks of non-residents not received in payment of taxes. Remit by Bank Draft, Express or Postoffice Money Order, payable to T. M. Word, Sheriff.

Address all communications to

T. M. WORD, Tax Collector,
Portland, Oregon.

DELINQUENT TAX

This statement must be returned when taxes are paid.

Portland, Ore., April 25th, 1913.

Title Guarantee & Trust Co.

Dr. to Multnomah County

For State, State School, County, Road, Port of Portland, and School District Taxes for the year 1911 and City of Portland Taxes for the year 1912 on the following described property:

| No. of Certifi- cate Del. | Sch. dist. 41500 | Page 6891 | Line 27 | Descrip- tion Personal Tax | Total Value 41500 | Amount of Tax 1012.60 |
|------------------------------------|------------------------|--------------|------------|----------------------------------|-------------------------|-----------------------------|
| | | | | | | 101.25 |
| | | | | | | <hr/> 1113.85 |

Interest 12% per annum from 1st Monday of April 1912 to date of payment.

Postage stamps and checks of non-residents not received in payment of taxes. Remit by Bank Draft, Express or Postoffice Money Order, payable to T. M. Word, Sheriff.

Address all communications to

T. M. WORD, Tax Collector,
Portland, Oregon.

[Endorsed]: Petition. Filed May 8, 1913.

A. M. CANNON,
Clerk.

Filed May 8, 1913.

A. M. CANNON,
Clerk U. S. Court.

And afterwards, to wit, on the 22 day of May, 1913, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer of Receiver to Petition of W. H. Evans.]

*In the District Court of the United States in and
for the District of Oregon, Ninth Judicial
Circuit in Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY,
PANY, a Corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,
Defendants.

In the Matter of the Insolvency and Receivership of
The Title Guarantee & Trust Company.

No. 3209

Answer of R. S. Howard, Jr., Receiver, to the Petition in Intervention of Walter H. Evans, District Attorney in and for the Fourth Judicial District, County of Multnomah, State of Oregon.

TO THE HONORABLE JUDGES OF THE ABOVE
ENTITLED COURT:—

The answer of R. S. Howard, Jr., receiver, to the petition in intervention of Walter H. Evans, District Attorney in and for the Fourth Judicial District, County of Multnomah, State of Oregon, for and on behalf of the City of Portland and the County of Multnomah and the State of Oregon, doth respectfully deny, admit, allege and represent:—

That on the 11th day of March, 1912, an intervention was filed herein by the County of Multnomah through R. L. Stevens, Sheriff and *ex officio* Tax Collector for Multnomah County for the matters and things stated and alleged in the present petition in intervention preferred by the said Walter H. Evans for and on behalf of the said City of Portland and the County of Multnomah and the State of Oregon and

said matter upon said petition in intervention so filed is pending in the above entitled court upon the answer of R. S. Howard, Jr., receiver, thereto filed on the 4th day of April, 1912.

That neither the City of Portland, the County of Multnomah or the State of Oregon are entitled to join or be heard jointly upon another and similar petition in intervention or to be heard in intervention upon the same matter and in the same cause while the petition first filed herein is pending.

This receiver denies that the County of Multnomah, the City of Portland or the State of Oregon or either of them has had or has now or ever did have since and after the 6th day of November, 1907, a lien or claim of any kind or nature whatsoever upon any of the property or funds in the possession or under the control of this court herein and in the hands of this receiver for taxes assessed or levied upon any such property.

This receiver denies that any levy or assessment for taxes upon personal property in the hands of this court and its said receiver on and after the 6th day of November, 1907, could have been made in the name of The Title Guarantee & Trust Company; and denies that The Title Guarantee & Trust Company is indebted to the City of Portland or the County of Multnomah or the State of Oregon or to either of them in the sums and amounts, either for tax or for penalty or for interest, as set forth in the petition of the said Walter H. Evans or in the statement of taxes attached thereto and marked "Exhibit A," and this receiver, as a

further part of his answer and in connection with the denial aforesaid, excepts for insufficiency in this behalf to the said petition in intervention of the City of Portland, of the County of Multnomah and of the State of Oregon in that as matter of law on and after the 6th day of November, 1907, no property or funds or assets of The Title Guarantee & Trust Company were assessed as such to The Title Guarantee & Trust Company; that the same were on that day and ever since have been and are now *in custodia legis* and that The Title Guarantee & Trust Company under a bill of complaint in this court was then in liquidation and being wound up.

That this receiver makes and incorporates herein as a part of this answer so much of and all of that part of his answer to the petition in intervention of R. L. Stevens as is set forth following, that is to say:—

“This receiver denies that the County of Multnomah and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in and for the State of Oregon, has had or ever did have since and after the 6th day of November, 1907, a lien or claim, preferred or otherwise, upon any of the property or funds in the possession or under the control of the receiver herein; and this receiver in connection with said denial excepts to the said petition in intervention of said County of Multnomah and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, for insufficiency in this behalf, to-wit, that as matter of law on and after the 6th day of November, 1907, no property or funds or assets in the possession of the receiver were subject to taxation, for

that the same were on that date and ever since have been and are now *in custodia legis* in the proceedings in this court in the above entitled cause for the liquidation and winding up of The Title Guarantee & Trust Company.

This receiver admits all of Paragraph I of said pretended petition in intervention, without conceding or admitting that a petition in intervention doth properly lie herein, and without admitting or conceding that Multnomah County or R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, hath or should have any right, title or claim to satisfy or proceed for in respect of taxes, as alleged in said petition in intervention, in any court, and this receiver denies that Multnomah County or R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in said State of Oregon, hath any such right, either to tax or proceed for a tax, since the 6th day of November, 1907.

This receiver admits all the matters and things alleged in Paragraph II of said pretended petition in intervention, consisting of lines 9 to 17 on page 2 thereof.

This receiver denies that Multnomah County, acting through its officers, did attempt to assess, levy and charge against personal property in the possession of this receiver, as alleged in Paragraph III in said pretended petition in intervention, the taxes therein specified and set forth for the purposes therein specified and set forth, and admits that none of the said alleged pretended taxes have been paid,

but admits that the tax regularly assessed for 1907 and which accrued and was properly a preferred claim and lien for taxes and which accrued prior to the 6th day of November, 1907, was duly paid; that as to whether or not the amounts for the years 1908, 1909 and 1910, as specified in said Paragraph III, are the amount of taxes assessed and levied, this receiver hath no knowledge or information sufficient to form a belief, and therefore denies the same, calling for proof in that particular; but this receiver expressly denies that any taxes for the years 1908, 1909 or 1910 were duly or at all or ever regularly or at all or ever assessed or levied upon and against the personal property so held and in the charge of the receiver herein under direction of this court.

This receiver denies each and every matter and thing stated and alleged in Paragraph IV in said pretended petition in intervention, lines 5 to 8, page 3 thereof, and every part of the same and the whole thereof; and doth deny that any of said sum whatever arising as alleged is or can be a first or prior or any lien or claim upon any of the property in the hands of this your receiver.

And in and about the matters and things in said pretended petition in intervention on behalf of Multnomah County and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, alleged, this receiver doth say that all of the officers of Multnomah County as well as said R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof, at all

times knew and were informed that on and after the 6th day of November, 1907, all of the property and assets of The Title Guarantee & Trust Company came into the custody of the United States Circuit Court in and for the District of Oregon then sitting, afterwards and now the above entitled court by virtue of the act approved and passed March 3, 1911, by the Congress of the United States, and that at the time of the purported levies and assessments said property then was and ever since has been and now is in the custody of said court and under the administration of the law and procedure thereof being administered upon in proceedings to liquidate and wind up The Title Guarantee & Trust Company.

That all of said property against which said pretended assessment, levy and lien are charged to exist and are alleged to have been made consists of and was personal property estimated by the Assessor of Multnomah County to be then in possession of The Title Guarantee & Trust Company, whereas in truth and in fact the said Assessor, B. D. Sigler of Multnomah County, then well knew and knows now that all of the personal property against which assessment was made and said pretended tax asserted and levied was personal property in the custody of the law in the possession of this court in the liquidation and winding up of The Title Guarantee & Trust Company, and not otherwise owned or possessed.

That all of said personal property against which said pretended tax for the years 1908, 1909 and 1910 is alleged to have been levied and made was and is

held by said receiver for the benefit of a large and multitudinous number of creditors, savings depositors and general claimants of The Title Guarantee & Trust Company, the major part of whom, if not all, as to which this receiver for the obvious reason of the multitudinous number of the same cannot specify in particular, were assessed in their own names and right for personal property taxes in respect of the amounts of personal property then held by them and being liquidated and wound up in these proceedings for the benefit of said creditors; that Multnomah County and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof, has received and obtained from said persons their due proportion of personal property tax; that to assert and claim against the receiver for the years 1908, 1909 and 1910 accordingly further tax upon personalty is double, excessive, non-uniform taxation without warrant of law.

That American Surety Company of New York, a large claimant in the personal property and assets of The Title Guarantee & Trust Company, paid to the State of Oregon vast sums of money in liquidation of the State of Oregon claims arising in The Title Guarantee & Trust Company transactions conducted by it with respect to State moneys; and by the payment thereof became subrogated to and stood in the place of a large number of claims and demands against The Title Guarantee & Trust Company which are the subject of the taxation alleged in the pretended petition in intervention for the very

years of 1908, 1909 and 1910, in addition to which said American Surety Company of New York paid its tax to the said State of Oregon as required by law for and in respect of the business done by it in said State and upon the subrogated demands arising by reason of the aforesaid transactions.

That likewise William M. Ladd, intervenor herein and petitioner by virtue of his agreements of guaranty for allowed and approved claims of depositors against The Title Guarantee & Trust Company, including savings deposits and other accounts, himself paid and discharged personal property taxes for the years specified in the alleged petition in intervention upon moneys, accounts and demands all of them severally included in the subrogations arising to him by reason of the advances of money under said guaranties for the benefit of the depositors of said Title Guarantee & Trust Company, as more particular reference to the records of the court herein in these proceedings will specifically show, said reference being now thereunto had.

That over and beyond these particular instances large numbers of other persons too numerous to mention and whom this receiver cannot particularly specify likewise, as hereinbefore generally alleged, paid personalty taxes upon personal property arising from and out of the affairs of The Title Guarantee & Trust Company in their particular names assessed.

That Multnomah County and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State

of Oregon, should not now be allowed or heard to allege and say that an alleged or pretended independent assessment and levy against personal property in the possession of said receiver could or should be collected from, or was a preferred or prior or first or any lien whatsoever upon property, funds and assets now in the possession of said receiver.

And in this behalf this receiver further presents and alleges that upon all realty found as part of the assets of The Title Guarantee & Trust Company and upon which the burden and expense of raising revenue for the government of the State and municipalities of Oregon were properly and duly assessed giving taxation at the rate and in the amount and for the times specified in said alleged petition in intervention, said taxes were duly paid.

But forasmuch as this is and was a proceeding for the liquidation and winding up of The Title Guarantee & Trust Company, all of the personal property and transitory assets of the said Title Guarantee & Trust Company came in and within the exclusive administration of this court and as aforesaid, the custody of the law, and there was no person other than those entitled to receive the same against whom any personal property tax could be assessed.

The personal property taxes in the State of Oregon are under the laws of taxation and revenue in said State, and were for the years 1908, 1909 and 1910, assessable and leviable only against the person, i.e., *in personam* and not *in rem*.

That the pretended assessments for 1908, 1909

and 1910 of personal property tax against said receiver, if made as alleged in said petition in intervention of the said County of Multnomah and R. L. Stevens, Sheriff and *ex officio* Tax Collector thereof in the State of Oregon, were illegal and void."

and doth make the same a part of this answer herein in so far as the same is material and relates to the same subject matter of taxation upon personal property for the years set forth in the petition of the said Evans.

And further answering this receiver doth say it was well known to the City of Portland and to the County of Multnomah and to the State of Oregon and the officials acting for them in the assessment and levying of taxes that on the 6th day of November, 1907, The Title Guarantee & Trust Company was not a person in law against whose property an assessment for personal property tax could be made for that all of its property, real, personal and mixed, was then in the hands of the officers of this court in the course of administration in the winding up and liquidation of said company and there was no other persons other than those entitled to receive the proceeds thereof against whom any personal property tax could be assessed.

That an assessment made against The Title Guarantee & Trust Company for the years 1908, 1909, 1910 and 1911 in the sums and amounts set forth in the petition of the said Evans are not valid and legal assessments in law nor in accordance with law so as to entitle the City of Portland, the County of Multnomah or the State of Oregon to enforce the same.

WHEREFORE, your receiver prays that he may be relieved of and from the entry of an order as prayed for in the petition in intervention; that the estate in his hands and under the administration of this court be declared free and clear of any claim for personal property taxes for the years 1908, 1909, 1910 and 1911; that the prayer of the petitioners be denied and that the petitions in intervention herein be dismissed and that the receiver have such other, further and different relief as in consonance with equity he may be entitled to.

R. S. HOWARD, Jr.,
Receiver.

W. C. BRISTOL,
Counsel for Receiver.

[Endorsed]: Answer. Filed May 22, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 25 day of July, 1913, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Answer to Petition in Intervention.]

*In the District Court of the United States for the
District of Oregon, Ninth Judicial Circuit,
in Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a corporation, J. THORBURN

ROSS, GEO. H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,
Defendants.

In the matter of the Insolvency and Receivership
of the Title Guarantee & Trust Company.

No. 3209.

To the Honorable Judges of the above entitled Court:

Come now the petitioners, the County of Multnomah, Oregon, and the Sheriff and ex-officio Tax Collector for said County and State and demur to the new matter contained in the answer of R. S. Howard, Jr., Receiver, to the petition in intervention filed herein by said petitioners, for the reason and upon the ground that said new matter does not constitute a defense to the matters and things set forth in said petition, nor does it set forth facts sufficient to show any reason why the said receiver should not be ordered to pay the taxes on the property in his hands, which were assessed and levied thereon as set forth in said petition.

EMMONS & WEBSTER,
Attorneys for Petitioners.

[Endorsed]: Demurrer to Answer. Filed July 25,
1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 23 day of March, 1914,
there was duly filed in said Court, an Opinion, in
words and figures as follows, to wit:

[Opinion of the Court.]

*In the District Court of the United States for the
District of Oregon.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a Corporation, J. THORBURN
ROSS, GEORGE H. HILL, T. T. BURK-
HART, JOHN E. AITCHISON and F. M.
WARREN,

Defendants.

W. C. Bristol for the Receiver,

Walter H. Evans, District Attorney for Multnomah
County,

Emmons & Webster for Petitioners.

WOLVERTON, District Judge:

Two petitions in intervention have been filed in the above matter by Multnomah County, praying that the receiver be required to pay the State, County, School and Municipal taxes assessed against The Title Guarantee & Trust Company, on certain personal property, for the years 1908 to 1911, inclusive, with penalties and interest.

A receiver was appointed for The Title Guarantee and Trust Company by this court on November 6, 1907, and the taxes which it is sought to have paid were assessed against the company a part of the time in its name alone, and a part of the time in the name of the company, R. S. Howard, Jr., Receiver.

The receiver resists payment on several grounds. First, it is urged that the law has made no provision for the assessment of receivers, and, having made none, they are not taxable as such.

As it respects assessment and taxation, the statute of Oregon has made all property, whether real or personal, subject thereto. Section 3551 Lord's Oregon Laws. By section 3560 it is required that every person shall be assessed as to his personal property, whether owned by him or under his control as trustee, guardian, executor or administrator, in the county in which he resides. Section 3563 provides that personal property of every private corporation is liable to taxation in the same manner as the personal property of a natural person, and shall be assessed in the name of such corporation, in the county where its principal place of business is, unless otherwise specially provided by law. The manner of assessment is provided by section 3593, which requires the assessor to set down on his roll, first, the names of all persons assessable in his county, and, among others, the taxable personal property owned by or to be taxed to such person. These are the principal provisions of the statute which in any way affect the present controversy, and it is clear that ample provision is made thereby for the assessment of a corporation.

But it is urged that "We are dealing with property here represented by a court through its receiver, and there is no method of assessment provided for corporate property."

The appointment of a receiver by a court does not

destroy the entity of the corporation. It yet remains with corporate power, at least for the purpose of winding out the business of the concern, for it is corporation business always that the receiver transacts.

All property being taxable, and corporations being liable to taxation, it is inconceivable that a suit in chancery and the appointment of a receiver by operation of law withdraws the corporate property from the power of assessment and taxation. Nor was it necessary that the receiver should, *eo nomine*, be designated as a person subject to assessment and taxation. He is but an arm of the court in the management of the corporation property, whether it be as a going concern or in process of dissolution, and the court holds the property subject to all the burdens and limitations to which the corporation itself was subject under the law, and one of these is the liability to taxation as a natural person. I am clear that a receivership does not withdraw the corporation from that liability. As is said by Mr. Chief Justice Fuller:

“Undoubtedly property so situated (in custodia legis) is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law.”

In *Re Tyler*, 149 U. S. 164, 182.

And it has been held that property in the hands of a receiver is properly assessable as the property of the corporation. Fed. Cas. No. 13405.

Nor is it important to whom the assessment is made, whether to the corporation or to the receiver. It is not vital to the validity of the tax. *Wiswall v. Kunz*, 173 Ill. 110.

Under the system for tax collections within this state a tax does not become a debt, and an action at law does not lie for its recovery. Nor is the tax upon personal property made a lien thereon, nor does any lien attach until a warrant is levied, and it may happen, as where the property of the person taxed is taken into another state or disposed of, that the tax collector will be left remediless in forcing collections. *Marion County v. Woodburn Mercantile Co.*, 60 Or. 367.

But where property remains within the jurisdiction and within the hands of the person taxed, there is no impediment to the enforcement of the payment of the personalty tax assessed against him.

It is beyond question at this date that when a court has appointed a receiver, his possession is the possession of the court for the benefit of the parties to the suit and all concerned, and cannot be disturbed without proper leave of the court. *In re Tyler*, *supra*: *Barton v. Barbour*, 104 U. S. 126; *Krippendorf v. Hyde and Another*, 110 U. S. 276.

Property so held may be said to be in equitable sequestration to answer the purposes of the receivership, and if it is sought to enforce an equitable lien or other demand which is a rightful charge against the property, it must be done by leave and under the sanction of the court so having the possession. The

levy of a tax warrant is a sequestration, like the levy of an ordinary *fiere facias*. Hence such levy could not in any greater degree be permitted to disturb the court's possession without its explicit sanction previously procured. *Ex parte Huidekoper et al.*, 55 Fed. 709; *Oakes v. Myers*, 68 Fed. 807; *Ledoux v. La Bee*, 83 Fed. 761.

In the present case there has been no attempt to levy a warrant, but it is urged, going back of the warrant, that there was no authority for the assessor, the property being in *custodia legis*, to assess the property, or for the proper officers to levy the tax, without leave of the court, and that the tax therefore is without validity, and should not be ordered paid out of the estate.

Seeing that property in the hands of a receiver is subject to assessment and taxation, I am of the opinion that the assessment and levy of the tax, since an invasion of the possession of the receiver is unnecessary to effect the purpose, is regular and valid. Being so, it is the duty of the court to require payment of the taxes levied if there be funds in the hands of the receiver applicable thereto. It was so held by the Supreme Court of Missouri where, as in this state, a personalty tax was not a lien upon the property taxed, and where also, as here, the state has the right to payment out of the assets paramount to other creditors. *Greeley v. The Provident Savings Bank et al.*, 98 Missouri 458.

"Having such paramount right," says the court in *Central Trust Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y.

250, 257, "the court may, in its discretion, listen to the petition of the state, through its attorney general, and direct its officer to make the payment asked for."

Indeed, the court may not only do so, but there is an imperative duty incumbent upon it to take cognizance of the laws of the state relative to assessment and taxation, and to require of its receivers payment of such taxes as are just and regularly levied, out of any assets they may have in their hands applicable thereto. See *In re Tyler*, *supra*, and *George et al v. St. Louis Cable & W. Ry. Co.*, 44 Fed. 117, 119.

This renders it clear that taxes levied upon the personalty of the corporation for the years 1908, 1909, 1910, and 1911, should be discharged, and equally clear that the court should direct the receiver to pay them.

But it is further urged that the receiver should not be required to pay the penalty and interest, notwithstanding the taxes have been long delinquent. Of this we may now inquire.

Taxes under the statute governing, as it relates to the collection of these now in controversy, were made payable on the first Monday of April of each year, with the provision that if one-half of such taxes were paid by the 15th day of March, the time of payment for the remaining one-half should be extended until the first Monday of October. It is further provided, however, that should the remaining half not be paid on the first Monday in October, the taxpayer should be subject to a penalty of ten per cent on the amount of the taxes remaining due, and also be subject to the

payment of 12 per cent interest thereon from the first Monday in April until paid. Section 3682 Lord's Oregon Laws. By the following section it is made the duty of the tax-collector immediately, on the first Monday of May in each year, to proceed to collect all taxes levied whereof one-half was not paid on or before the first Monday of April. And so also to collect all taxes that might remain unpaid by the first Monday of October, together with the penalty of 10 per cent and the interest thereon at 12 per cent per annum.

It will be seen that a direct penalty is imposed for nonpayment of taxes when due, but there is a further burden imposed upon the taxpayer to pay interest at the rate of 12 per cent per annum. This interest is double the legal rate of interest otherwise fixed by statute, and is above the rate which parties may charge by express agreement. While the statute calls it interest, it is very obvious that it operates as a penalty, and I am impelled to the conclusion that the exaction of the 10 per cent and the 12 per cent called interest must each be regarded as in effect a penalty for the nonpayment of taxes when due.

Now, in the case at bar the taxing officers were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands. This before any of the taxes in question were levied. While it may be the duty of the receiver to pay the taxes legitimately due, or to apply to the court for authority to do so, yet when a question has arisen touching the validity of the tax,

and the taxing officers are advised of that fact, the duty is all the more incumbent upon the tax collector to proceed promptly in the proper way to require the payment of such tax. Under present conditions, there was no way for the tax collector to proceed other than to apply to the court for an order requiring the payment by the receiver. In such procedure the legality of the tax could well be determined, and, if found proper, the order for payment would reasonably follow.

But the tax collector was not required to enforce collection until after the taxes became delinquent. He should have proceeded immediately, however, on the first Monday in May of each year. At this time the penalty of 10 per cent had been incurred, and the interest at 12 per cent had accrued for the time intervening from the first Monday in April. If prompt application had been made to the court, further penalty would not have been visited upon the receiver. I think this should have been done, and the tax collector should not have waited one, two, three and four years before attempting to enforce the tax in the only way in which it could be done. For this reason, I am not inclined to burden the estate with the accruing interest from and after the first Monday in May each year as it relates to the taxes for the several years involved. This conclusion is sustained by the principle announced in the cases of *County Com'rs of Prince George's Co. &c. v. Clarke & Berry*, 36 Maryland 206, and *Blakistone v. State*, 117 Maryland, 237.

The receiver will therefore be directed to pay the

State, County, School and Municipal taxes for the years 1908, 1909, 1910 and 1911, together with the penalty of 10 per cent on the amount of the tax for each year, and the interest of 12 per cent accruing between the first Monday in April and the first Monday in May, and such will be the order of the court.

And afterwards, to wit, on the 27 day of March, 1914, there was duly filed in said Court, a Petition for Rehearing, in words and figures as follows, to wit:

[Petition for Rehearing.]

*In the District Court of the United States in and for the
District of Oregon, Ninth Judicial Circuit,
in Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY,
a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,
Defendants.

In the Matter of the Insolvency and Receivership of
The Title Guarantee & Trust Company.

No. 3209.

In the Matter of the Intervention of Multnomah County for Personal Property Taxes.

Petition upon the part of the Receiver for a rehearing against the decision given and rendered herein on the

23rd day of March, 1914, as per copy of opinion filed.

To the Honorable Judges of the Above Entitled Court:—

The receiver herein recognizing the rule that requires him to abide by the directions and orders of the Court herein, but respectfully deeming it his duty to call to the Court's attention matters and things which it may have overlooked and to cause it to be more fully informed, and deeming that the Court has overlooked and not fully informed itself upon the matters and things relative to the intervention of Multnomah County for the payment of personal property taxes, doth represent and show that a reconsideration and rehearing should be had of the determination or decision reached by the Court on the 23rd of March, 1914, as per opinion herein filed, for the following reasons:—

FIRST.

That the Court did not decide or determine and apparently overlooked the Fourth contention of the receiver in the main brief at page 2 reading as follows:—

“*FOURTH.* That all of the so-called personal property mentioned in the intervening petitions, if assessed to The Title Guarantee & Trust Company, has been and was doubly assessed, for that all of such property was the property of the creditors and claimants who presented their claims to the receiver and had said claims approved and allowed during the times and for amounts which represented the actual conversion of the personal property of The Title Guarantee & Trust Company into liquidated assets which were in turn distributed to said creditors and claimants who in turn paid personal

property taxes assessed to each of them individually, and hence it is not competent for Multnomah County to claim that during the same time and in respect to the same property other personal property taxes could be assessed against and collected from The Title Guarantee & Trust Company or its estate."

SECOND.

That the Court apparently in its opinion construes The Title Guarantee & Trust Company, as in other like cases, a going concern for the purpose of considering the submission of property belonging to it to taxation, but in this the Court has overlooked and has not decided upon the Fifth ground of the receiver's contention which is set forth on page 3 of the main brief herein, to-wit:—

"*FIFTH.* The affairs of The Title Guarantee & Trust Company are not in the nature of an operated concern kept alive by a receivership and administered by the court, but upon the 2nd day of November, 1907, it became insolvent, admitted its insolvency, its officers came into court and surrendered the company to the court, the court took possession of it, appointed its receiver and there has been no corporate management subsequent to such control, except only for the purpose of a more full and better administration of this court."

THIRD.

That for so much of the property as was assessed to The Title Guarantee & Trust Company only and not to R. S. Howard, Jr., receiver thereof, the Court has overlooked and decided apparently for the payment of all of

said tax or taxes as if the same had in the first place been assessed against a going concern temporarily involved in a receivership, while the records and facts of record in this proceeding and in this Court show The Title Guarantee & Trust Company did not during any of the times and was not during any of the times said taxes claimed for are purported to have been assessed doing any business in the State of Oregon and this was a point made on the argument and in the briefs and not passed on by the Court in its decision, the main brief on the question on this point saying, at bottom of page 4 and top of page 5, as follows: —

“But this receivership is not a receivership of a going concern nor during the pendency of the litigation, but is an actual administration by the court of corporate property surrendered not only by the corporate entity itself, but by the officers representing it and given into the possession of the court for the purpose of being administered and distributed to creditors, who, as the administration has proceeded, have themselves been assessed upon the amounts of personalty coming into their possession.”

And again at page 10 of said main brief as follows:—

“BUT IN THIS CASE WE ARE NOT PRESENTED WITH A SITUATION UPON EITHER PETITION OF A TAX ACTUALLY ATTACHING TO PROPERTY PREVIOUS TO ANY POSSESSION BY THE COURT. THE TAX FOR 1907 COULD NOT BE LEVIABLE AS A MATTER OF LAW UNTIL AFTER THE

1st OF JANUARY, 1908, AND THE BOARD OF EQUALIZATION DID NOT SIT AND DETERMINE THE TAX ROLL ASSESSMENT UNTIL OCTOBER, 1907, AND BEFORE THE AMOUNT OF THE TAX COULD BE COMPUTED FOR THE YEAR 1908 ALL OF THE PROPERTY OF THE TITLE GUARANTEE & TRUST COMPANY HAD PASSED INTO POSSESSION OF THE COURT, HENCE WE HAVE NOT A CASE PRESENTED HERE WHICH IS LIKENED TO THE CASES THAT ORDINARILY ARISE IN THE MATTER OF IMPOSITION OF TAXES UPON GOING RECEIVERSHIPS."

FOURTH.

It was a proposition made in the main brief and ample authority was cited showing the practice in the State of Oregon to be fixed in that regard that it is the law of the State of Oregon that a Court of equity is without power to render a money judgment for the amount of personal property taxes, but said point was apparently overlooked by the Court and the cases cited in the main brief on page 11 not considered by it, the said point being made in language and cited cases as follows:—

"Furthermore, it is the law in the State of Oregon that a court of equity is powerless to render a money judgment for the amount of personal property taxes.

Phills v. Kelly, 12 Or. 213;

Ming Yue v. Coos Bay Railroad, 24 Or. 392;

Steamer v. Scottish Insurance Co., 33 Or. 65;

Denny v. McCown, 34 Or. 47;

Multnomah County v. Portland Cracker Co., 49
Or. 352."

FIFTH.

The Court apparently overlooked and did not consider the cases cited in the main brief on page 13 as follows:—

"Ex parte Chamberlain, per curiam opinion, 55
Fed. 704 to 709;

Burleigh v. Chehalis County, 75 Fed. 873;

Virginia Steel & Iron Co. v. Bristol Land Co.,
88 Fed. 134;

Pennsylvania Steel Co. v. New York City Rail-
way Co., 193 Fed. 286; same case, 176 Fed.
477."

The foregoing cases are cited, explained and applied on pages 13 to 18 of the main brief, but seem to have escaped the attention of the Court.

SIXTH.

And the principle differentiating this case from the class of cases where going corporations are in the hands of receivers seems to have been overlooked by the Court in applying *Central Trust Company v. New York City Northern Railroad*, 110 N. Y. 256, for this Court does not touch upon the fact that where a corporation surrenders itself, as was done by *The Title Guarantee & Trust Company*, in a winding up suit for liquidation of all of its property that said property does not remain property of the corporation, but becomes and is property of its creditors; and this Court overlooked and has not determined in its decision the question that such

property so belonging to creditors was not in the mind of the framer of the statutes said to provide for the assessment of taxes against personal property of a corporate business in any such case.

SEVENTH.

The decision of the Court as given seems to go upon the point that there being statutes authorizing the assessment of personal property that such personal property is assessable in the hands of a receiver and that the receiver should pay the tax, whereas in truth and in fact there is no such statute in the State of Oregon providing for the assessment of personal property in the custody of the law and in the course of liquidation through a Court where that property then is not in the physical possession of any one other than the Court; and in this regard the Court further overlooks the points made in the argument and in the reply brief filed December 19, 1913, herein, in which reply brief the following was presented to the Court which it has apparently overlooked in the opinion now rendered:—

“The position of the counsel for the intervenor, Multnomah County, does not answer the legal points presented upon argument or in the brief of the receiver first filed.

The whole position of the intervenor presupposes a valid tax and a right to collect that tax *as if* it were assessed against The Title Guarantee & Trust Company as a going concern.

It was conceded in court and upon the argument that The Title Guarantee & Trust Company ceased

to be a going concern on the 6th day of November, 1907.

The Title Guarantee & Trust Company at the time of the assessments made in the record and for which the intervening petitioner seeks relief was not carrying on its business. It was closed. It had resigned all of its right to do business. There was neither vestige of control nor ownership in The Title Guarantee & Trust Company of any of the property formerly owned by it.

At the time of the pretended assessments the court represented the business and was conducting it. No other assessment was attempted to be made than those shown upon the assessment rolls produced in court."

EIGHTH.

The point was made upon the argument in the presentation of the case and in the briefs and specifically called to the attention of the Court again on pages 5 and 6 of the reply brief, as follows:—

"THE RECEIVER HAS ALL ALONG CONTENDED THAT THE PETITIONS IN THIS CASE WERE NOT SUFFICIENT TO JUSTIFY A RECOVERY. IT NOWHERE APPEARS THAT THE COUNTY OF MULTNOMAH EXHAUSTED ITS REMEDIES AS AGAINST THE REAL ESTATE IN THE NAME OF OR CLAIMED TO BE HELD BY THE TITLE GUARANTEE & TRUST COMPANY AND IT IS ONLY AGAINST REAL ESTATE OR AGAINST THE PERSONAL PROPERTY IT-

SELF *IN SITU* THAT THE DELINQUENCY CAN BE ENFORCED BY A WARRANT.

These proceedings have not been taken. It is admitted by counsel they could not take them because it would be a sequestration of the property in the hands of the federal court, but the law is that the remedies prescribed for the collection of the tax is exclusive. It therefore follows that if by reason of any situation the county could not exercise that remedy, that does not place in the hands of this court the power to decree a money judgment in favor of the county against the receiver."

NINTH.

The Supreme Court of the United States in the case of *United States v. Whitridge*, 227 U. S., 57 L. Ed. 701, affirmed the decision of the *Pennsylvania Steel Co. v. New York City* in 190 Fed. 777, and directly applies the principle that because the entity of a corporation ceased by the appointment of receivers there could necessarily be no income subject to return as against the receivers for corporation tax. Now the very point of this decision is that if, as the Court now holds in the opinion it has rendered, a corporation exists for the purpose of taxation as to property in the physical possession of its receiver, then the income of that property would necessarily be subject to taxation under the acts of congress, but the Supreme Court of the United States holds that it is not, and it is respectfully submitted that this Court in its decision has overlooked entirely the application of its receiver's contention in this, to-wit: That if this was a receivership of a going concern and

the property being run and not wound up and distributed to other people as their proved and allowed claims as determined and allowed have required, there would be ground for application of the cases which permit taxes to be levied, assessed and collected against receivership property; and it is submitted that the decision of the Court does not touch this view of the case, but adopts the other rule, namely, that taxes are always assessable against a corporation conducted by a receiver and such a rule is not applicable in this case for several reasons: First, there is no law to justify such an assessment; second, the evidence of the assessments as made were part of them to The Title Guarantee & Trust Company and not to the receiver at all; third, the assessments as made were as to property which passed into the hands of the distributees who are likewise assessed upon their personalty; fourth, there is not in the statute law of the State of Oregon any method of assessment of property in the hands of a Court being wound up through its processes of administration for the benefit of creditors; and, fifth, even bankruptcy courts and the statutes relative to administration of estates provide only for taxes *in esse* at the time of the commission of the act of bankruptcy or the death of the testator and taxes afterwards upon personalty are paid not by the bankruptcy estate or the estate of the decedent, but by those into whose hands the property is distributed.

TENTH.

The Court's opinion apparently disrewards the testimony and evidence taken in the hearing as given by the witness Chief of Field Work in the Assessor's office on

cross-examination on pages 39, 40, 41, 42, 43, 44 and 45, as follows:—

“Q. Did you find out, and refresh your memory about R. S. Howard, Jr., Receiver, business?

A. NO, I DIDN'T LOOK ANY FURTHER IN REGARD TO IT, MR. BRISTOL.

Q. I WILL CALL YOUR ATTENTION TO INTERVENOR'S EXHIBIT 2 AND ASK YOU IF I UNDERSTAND YOU CORRECTLY THAT THIS RED SHOWS THAT THE SAME SORT OF AN ARBITRARY ASSESSMENT WOULD BE MADE TO THE TITLE COMPANY FOR 1909?

A. EXACTLY.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. IT WOULD BE ABSOLUTELY THE SAME. THE RED IS PUT ON THERE FOR THE BENEFIT OF THE ASSESSOR IN MAKING COMPARISONS EACH YEAR.

Q. I AM PARTICULARLY ANXIOUS TO KNOW WHETHER THE NAME OF THE RECEIVER WOULD BE UPON THAT ASSESSMENT OR THAT STATEMENT AT ALL?

A. WELL, THAT I COULD NOT TELL YOU.

Q. Well, it is not on that one, is it?

A. No. That I could not tell you. But the amounts here are taken, these amounts here are taken from the previous.

Q. Yes, I understand that; the previous roll?

A. Yes. But in regard to the name, why, I could

not tell you.

Q. Well now, this roll says, 'Title Guarantee & Trust Co.', don't it?

A. Yes.

Q. 'Character of business, banking'?

A. That is the item, the statement there, although the roll might include even more than that.

Q. All right; let's look at it. 6782, line 45, would represent the roll for 1910, wouldn't it?

A. Yes, sir.

Q. That is on Intervenor's Exhibit 2 and is the entry that shows that this statement was entered?

A. Yes, sir, that is it exactly.

Q. I notice on here in blue pencil, 'See Maxwell before entering.' What does that mean?

A. Well, evidently Mr. Maxwell asked something in regard to it. Maybe he wrote it himself. I don't know whether he did or not.

Q. Why was it that Maxwell was always the fellow that was particularly concerned here about this Title Guarantee & Trust Company tax apparently?

A. Well, that I don't know, otherwise than that he was chief deputy in the office. Otherwise I could not tell you.

Q. Now, I show you the 1909 roll at the point and place where line 46 appears, and ask you by what authority anybody would have to enter the name of the Receiver, in view of the fact that you told us this morning on your direct testimony that these entries here were made up from statements previously prepared and that this statement, Intervenor's Exhibit 2,

which you say is a proper one, does not show the name R. S. Howard, Jr., Receiver?

A. Well, that would not be any reason why that they could not be added to it, because it is not a tax roll, Mr. Bristol.

Q. Well, but I am getting at the fact that you stated—

A. (Interrupting) It could not be—

Q. (Interrupting) Now, wait a minute. Did I understand you correctly that the foundation for the roll itself is either a previous blank or a previous statement either actually made by the owner or arbitrarily made by the Assessor?

A. Yes, sir.

Q. Is that true?

A. That is true.

Q. Now then, it is also true, isn't it, that Intervenor's Exhibit 2, you told us was the same by reason of these red letters that you identify it by, was the same for 1909 as it was for 1910?

A. Yes, sir. These items—

Q. (Interrupting) Now then, these—

Mr. EVANS: (Interrupting) Wait until he gets his answer finished.

Mr. BRISTOL: All right. Go ahead.

WITNESS: These items are absolutely the same. (Indicating.) These may not be the same, because if this had changed hands and was under a different name, why, these items would appear, as this was assessment on the particular property.

Mr. EVANS: 'This' and 'these' don't get in the

record.

Q. (Mr. Bristol) So you did have some information then with regard to the future whether the institution changed hands, did you?

A. Oh, sure.

Q. Now, as a matter of fact, it had changed hands prior to 1909, hadn't it?

A. Yes; part of it was changed hands anyway, before that.

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was constantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced,

the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor marked this up, now—

Q. (Interrupting) What you are referring to as 'this', is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Howard, Jr.'s name so long as he notifies him.

Q. So long as he notifies him?

A. Yes.

Q. Have you got any proof that he ever notified him?

A. Yes.

Q. What?

A. The record shows, you know, the date of the notification, and that is the only person that he could

notify.

Q. Where is the record of notification in 1909 that you notified the Receiver?

A. We haven't got it here.

Q. You haven't got it here. Did you notify the Receiver?

A. I always do.

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. ALWAYS DO, BECAUSE THE ASSESSOR KNEW—THERE IS NO DOUBT BUT WHAT HE KNEW THE TITLE GUARANTEE & TRUST COMPANY WAS IN THE HANDS OF A RECEIVER AND THAT R. S. HOWARD, JR., WAS THE RECEIVER.

Q. NOW, MR. FUNK, JUST A MINUTE. I DON'T WANT YOU TO MAKE A STATEMENT THAT MIGHT BE INCORRECT.

A. I DON'T WANT TO, EITHER.

Q. I KNOW, BUT LISTEN. NOW LET ME REMIND YOU: YOU REMEMBER THAT GEORGE H. HILL WAS THE FIRST RECEIVER IN THIS COURT, DON'T YOU, AND THAT HE WAS REMOVED?

A. YES, I REMEMBER HE WAS, YES.

Q. AND YOU REMEMBER THAT NEXT TO GEORGE H. HILL CAME EDWARD C. MEARS, WHO WOULD BE THE RECEIVER IN THE YEAR THAT THIS ASSESSMENT WAS MADE, 1909.

A. Well then, probably Mr. Mears is the man

that—

Q. (Interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. WELL, IF MR. MEARS WAS THE RECEIVER AT THE TIME THAT THIS ROLL WAS TURNED OVER TO THE BOARD OF EQUALIZATION, I HAVEN'T ANY EXPLANATION.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in the Board of Equalization in October of 1908, wouldn't it?

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not the 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. IN OTHER WORDS, THEN, IF THAT BE THE CASE, THERE IS TWELVE MONTHS YET IN OUR FAVOR THAT I DIDN'T KNOW ABOUT. THE ROLL FOR THIS YEAR OF 1913, FOR INSTANCE, WE WENT BEFORE THE BOARD AS TAXPAYERS IN OCTOBER, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

Q. Is that right?

A. The 1st of February.

Q. The 1st of February, yes. Now then, this 1909 roll then would not be subject to collection upon it until the following 1st of February, 1910?

A. That is correct."

ELEVENTH.

Furthermore, the Court likewise disregarded and apparently overlooked the evidence and the concession that the only time and the first time that R. S. Howard, Receiver, was ever assessed was upon roll page 6119, line 12 for 1913, the present roll, pages of the record 79, 80 and 81, and the evidence does not disclose and there was not any evidence tending to show or prove that any assessment was made against property of The Title Guarantee & Trust Company or its receiver as a going concern or otherwise than as shown on said rolls in the name of The Title Guarantee & Trust Company as if it were a going concern.

TWELFTH.

That the Court was in error in holding and deciding in its opinion as follows, to-wit:

"But it is urged that 'We are dealing with property here represented by a court through its receiver, and there is no method of assessment provided for corporate property.'

The appointment of a receiver by a court does not destroy the entity of the corporation. It yet remains with corporate power, at least for the purpose of winding out the business of the concern, for it is corporation business always that the receiver transacts.

All property being taxable, and corporations being liable to taxation, it is inconceivable that a suit in chancery and the appointment of a receiver by operation of law withdraws the corporate property from the power of assessment and taxation. Nor was it necessary that the receiver should, *eo nomine*, be designated as a person subject to assessment and taxation. He is but an arm of the court in the management of the corporation property, whether it be as a going concern or in process of dissolution, and the court holds the property subject to all the burdens and limitations to which the corporation itself was subject under the law, and one of these is the liability to taxation as a natural person. I am clear that a receivership does not withdraw the corporation from that liability."

for the reason that therein the Court fails to note and discriminate the difference made and presented upon the argument, viz: THAT THIS PROCEEDING IS A WINDING UP AND LIQUIDATION SUIT AND THE CORPORATION IS NOT BEING RUN BY ITS OFFICERS OR MAINTAINED AS A CORPORATION, BUT ON THE CONTRARY SURRENDERED ITS CORPORATE ENTITY TO THE COURT, AND ALL OF ITS PROPERTY, AND PARTICULARLY ALL OF ITS PERSONAL PROPERTY, IS AND WAS BEING DISTRIBUTED WITHOUT REGARD TO ANY LAWFUL TAX LEVIED THEREON; and for the further and additional reason that the personal prop-

erty claimed to have been assessed was not the property of the corporation, but the trust fund for the creditors and claimants of the corporation who had proved and allowed claims against the same; and for the third and further reason that no business has ever been done by the corporation, The Title Guarantee & Trust Company, of any kind or nature whatsoever since the 2nd day of November, 1907, long prior to the alleged assessment of taxes on personalty herein, SO THAT THERE WAS NO PERSONAL PROPERTY OF THE CORPORATION TO BE ASSESSED IN THE SAME MANNER AS THAT OF A NATURAL PERSON NOR WAS THERE ANY PERSONAL PROPERTY IN THE HANDS OF THE RECEIVER ASSESSED DURING SAID PERIOD, THERE BEING NO SUCH CLASS OF PROPERTY DEFINED IN THE LAW FOR ASSESSMENT AND TAXATION IN OREGON.

THIRTEENTH.

That the Court erred in holding and deciding "But where property remains within the jurisdiction and within the hands of the person taxed, there is no impediment to the enforcement of the payment of the personalty tax assessed against him," for the reason that there was no property in the hands of R. S. Howard, Receiver, as distinguished from R. S. Howard, an officer of this Court holding said property in trust for the creditors of The Title Guarantee & Trust Company subject to the orders of said Court, and an assessment to The Title Guarantee & Trust Company as a corporation if, as and upon a personal property

assessment cannot be said to be a tax upon the property of a corporation or upon the property within jurisdiction and within the hands of the person taxed.

FOURTEENTH.

That the Court erred in holding and in deciding and in the application of the cases therein cited to the principle contended for as follows, to-wit:—

“Being so, it is the duty of the court to require payment of the taxes levied if there be funds in the hands of the receiver applicable thereto. It was so held by the Supreme Court of Missouri where, as in this state, a personalty tax was not a lien upon the property taxed, and where also, as here, the state has the right to payment out of the assets paramount to other creditors. *Greeley v. The Provident Savings Bank et al.*, 98 Missouri 458.

‘Having such paramount right,’ says the court in *Central Trust Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250, 257, ‘the court may, in its discretion, listen to the petition of the state, through its attorney general, and direct its officer to make the payment asked for.’

Indeed, the court may not only do so, but there is an imperative duty incumbent upon it to take cognizance of the laws of the state relative to assessment and taxation, and to require of its receivers payment of such taxes as are just and regularly levied, out of any assets they may have in their hands applicable thereto. See *In re Tyler*, *supra*, and *George et al v. St. Louis Cable*

& W. Ry. Co., 44 Fed. 117, 119.

This renders it clear that taxes levied upon the personalty of the corporation for the years 1908, 1909, 1910, and 1911 should be discharged, and equally clear that the court should direct the receiver to pay them."

for that in the Greeley case from Missouri, as in the Central Trust case from New York, as applied herein the taxes were for those accrued and assessed prior to the actual proceedings in insolvency, BUT WE HAVE NO SUCH CASE PRESENTED HERE.

FIFTEENTH.

That the Court erred in holding and deciding "The receiver will therefore be directed to pay the State, county, school and municipal taxes for the years 1908, 1909, 1910 and 1911," for the reason that it appears, and the Court so holds, "In the case at bar the taxing officers were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands. This before any of the taxes in question were levied"; and for the further reason that none of said taxes were assessed or collectible in any year for which the corporation was a going concern and in respect of which its personalty was assessable as that of a natural person as it did not do, as it did not transact and as it was incapable of transacting any business with respect to its personal property within the protection of the State, but all of the same was in the hands of its creditors through the administration of this Court.

WHEREFORE, your receiver prays that the Court

take cognizance of these matters and application of them give to the facts at bar before entering any final order herein upon said opinion, and that the Court reconsider and correct before entering any final order herein the decision and opinion made by the Court herein in such manner that the matters and things presented shall be decided so that the proceeds of property in the hands of the receiver may be conserved to application to proved and allowed claims and that the receiver may have more full and complete adjudication of the matters submitted and the receiver have such other, further and different relief in the premises as he may be entitled to.

R. S. HOWARD, Jr.,
Receiver.

W. C. BRISTOL,
Attorney for Receiver.

[Endorsed]: Petition for Rehearing. Filed March 27, 1914.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 23 day of April, 1914, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Judgment Order.]

*In the District Court of the United States for the
District of Oregon.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE AND TRUST COMPANY, a corporation, J. THORBURN ROSS, GEORGE H. HILL, T. T. BURKHART, JOHN E. AITCHISON and F. M. WARREN,

Defendants.

The court having heretofore, on, to-wit, the day of, 1914, heard the testimony upon the questions raised by the two petitions in intervention of Multnomah County, praying that the receiver herein be required to pay the State, County, School, and Municipal taxes assessed against the Title Guarantee and Trust Company on certain personal property for the years 1908 to 1911 inclusive, together with the penalties and interest, and the court having heard the arguments, considered the briefs submitted, rendered its opinion thereon, and overruled a motion for re-hearing herein,

IT IS HEREBY ORDERED AND DIRECTED, that R. S. Howard, Jr., Receiver herein, pay to the TAX COLLECTOR of Multnomah County, on account of the State, County, School, and Municipal taxes assessed against the personal property of The Title Guarantee and Trust Company for the year 1908, the sum of \$1,304.00 in taxes, and the further sum of \$130.40, being 10 per cent penalty on the amount of the above taxes, and \$13.04 being interest on the above taxes at 12% from April 5, 1909 to May 5, 1909, and further that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School, and Municipal taxes assessed

against the personal property of The Title Guarantee and Trust Company for the year 1909, the sum of \$747.00 in taxes, and the further sum of \$74.70, being 10% penalty on the amount of the above taxes, and \$7.47, being interest on the above taxes at 12% from April 4, 1910 to May 4, 1910, and further, that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee and Trust Company, for the year 1910, the sum of \$913.00 in taxes, and the further sum of \$91.30, being 10 per cent penalty on the amount of the above taxes, and \$9.13, being interest on the above taxes at 12% from April 3, 1911 to May 3, 1911.

Dated at Portland, Oregon, this 23rd day of April, A. D., 1914.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Order. Filed April 23, 1914.

A. M. CANNON,

Clerk.

And afterwards, to wit, on the 13 day of March, 1914, there was duly filed in said Court, a Transcript of Evidence, in words and figures as follows, to wit:

[Testimony.]

*In the District Court of the United States for the
District of Oregon.*

In Equity.

N. COY,

vs.

TITLE GUARANTEE & TRUST COMPANY,
a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN.

In the Matter of the Intervention of Multnomah County for Personal Property Taxes assessed to the Title Guarantee & Trust Company.

Be it Remembered that in the above entitled case the matter of Intervention came on regularly for trial, and the same was heard before the Honorable C. E. Wolverton, one of the Judges of the above entitled Court, on Wednesday, November 26, 1913, beginning at 10 o'clock A. M., Messrs. Emmons & Webster (Mr. Emmons) and Mr. Walter H. Evans, District Attorney of Multnomah County, Oregon, appearing for Multnomah County, Oregon, and Mr. W. C. Bristol appearing for R. S. Howard, Receiver of the Title Guarantee & Trust Company; whereupon the following proceedings were had, to-wit:

The COURT: Are the parties ready now in this case?

Mr. BRISTOL: The defense is ready, your Honor.

Mr. EVANS: May it please the Court, I find on inspecting the petition that was filed by myself here in this proceeding the stenographer in binding up the copies of the tax rolls instead of binding up one for each year, as the petition sets out the taxes, has inadvertently bound all of one year's lists in there, and I would ask leave to put the proper ones in there.

Mr. BRISTOL: Yes.

Mr. EVANS: I don't know whether your copy is

correct.

Mr. BRISTOL: Mine is exactly the same.

Mr. EVANS: The same thing?

Mr. BRISTOL: Yes. All the exhibits you have attached here are only the taxes for one year and show exemplifications for that particular period and none other, although your petition purports to show for the several years therein mentioned.

Mr. EVANS: It is clearly a clerical error, and I will ask leave to correct that by filing the proper ones.

The COURT: Very well.

Mr. EVANS: There are two petitions in this matter. The first one as filed sets forth the amount of the taxes and petitions for an order requiring the receiver to pay the taxes that were assessed on personal property of the Title Guarantee & Trust Company for the years 1908, 1909, 1910. The taxes for the year 1907 were paid.

Mr. BRISTOL: Your petition, though, asks for the taxes for 1907.

Mr. EVANS: No, I think not. We allege that they were assessed and levied for the years 1907, 1908, 1909 and 1910, but we say that such taxes with the exception of those assessed and levied for the year 1907 have not been paid. We admit they have been paid for the year 1907. There is no controversy as to that.

Mr. BRISTOL: Well, the point I am making, so the Court understands, is that we do not concede, never have conceded, and don't concede now, that the receiver ever paid any taxes for the year 1907 or any other year. They may have been paid, but that is

neither here nor there.

The COURT: Then that is simply not in controversy?

Mr. BRISTOL: Not in controversy.

Mr. EVANS: That is not in controversy. It doesn't make any difference whether the receiver paid them or did not pay them, they are not in controversy. Now in this petition setting forth the assessment and levy of these taxes, the receiver after denying certain allegations of the petition, comes in and sets up the fact that this property of the Title Guarantee & Trust Company came into his hands as receiver, and he has held it and continued to administer it as receiver, and for that reason that this property is not assessable because it is in the custody of the law, as I understand the petition. They set forth here this new matter, setting up the receivership and the custody, etc., and to that new matter the petitioner has filed a demurrer on the ground that there is no defense to the right of payment, to have an order for the payment of these taxes, and that question comes up under demurrer and it is a question whether the Court wishes to take that up separately or to consider the whole case at this time.

The COURT: Well, I suppose the whole matter will come up. The demurrer is to the whole matter, isn't it?

Mr. EVANS: Well, it seems to us that it does, but counsel for the receiver I believe takes a different position.

Mr. BRISTOL: I haven't taken any view at all.

You never brought your demurrer on for hearing. I neither concede your facts, nor the law. That is the issue. Now if the Court thinks it is convenient to hear the whole case, that is suitable to me. I don't care. If you want to try it on a matter of law, I am not conceding the point of law either.

The COURT: Are the facts disputed?

Mr. BRISTOL: Yes, your Honor, the facts are disputed.

Mr. EVANS: I think perhaps if the facts are disputed it might be shorter to introduce the evidence as to the assessment and levy and consider the questions of fact and law all together at one time, if that is satisfactory to the Court.

The COURT: Well, I suppose that would be just as well, and then you can argue the case, the demurrer along with the facts. Of course, I suppose the regular way would be to try out the demurrer, and then the Court pass on that, and then after the Court has ruled the matter would go to a hearing on the questions of fact. That would be the regular order.

Mr. EVANS: That was my idea. We had it set down several times, but it wasn't convenient for counsel a couple of times to have it come up, and I believe the last arrangement was that the case be set down and the whole matter tried out at one time. I am perfectly willing to take up the questions of law. It seems to me that the admissions in the answer here show—

The COURT: (interrupting): I was going to say, if counsel have agreed that the facts go in now, is

there much of them?

Mr. BRISTOL: No, your Honor. I don't think it will take them fifteen minutes, and it will relieve Mr. Evans of a lot of trouble with reference to his petition, and it seems to me we would get along faster. I will make a suggestion that Mr. Evans will state his position and I will state mine, and he will take such evidence as he wants to produce, I will put in such evidence as I want to, and then we will argue the questions of law.

Mr. EVANS: That will be suitable.

Mr. BRISTOL: That is, the whole case. I don't care. But I don't want to waive anything by that argument.

Mr. EVANS: No, no.

Mr. BRISTOL: So if you will state the issues from your standpoint I will state it from mine, and you may go ahead.

The COURT: Very well. You may do that.

Thereupon opening statements were made by the respective counsel, after which—

The following evidence was given on behalf of the Petitioner herein, to-wit:

E. S. HUCKABAY was produced as a witness on behalf of the Petitioner, and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. EVANS:

Q. What official position do you hold in Multnomah County, Oregon?

A. Chief deputy of the tax collecting department of the Sheriff's office.

Q. I asked you to bring with you the assessment roll of Multnomah County for the years that the taxes are involved here. I will ask you what that book is you have now.

A. This is the assessment roll of personal taxes of the year 1908.

Q. That is a book brought from the records under your direction?

A. Yes.

Q. Will you call the Court's attention to the line indicating the assessment made for 1908 against the Title Guarantee & Trust Company.

A. It is shown on—

Q. (Interrupting) Just explain every item on there and read it off.

A. This is the regular form of assessment which was made up for the Assessor's office. This is the particular item in question here. The assessment was made for the year 1908 in the name of the Title Guarantee & Trust Company; address, Second and Washington street, and itemized as follows: Merchandise, stock in trade, sixty-two thousand five hundred dollars. Household furniture or office furniture, that is to include, two thousand seven hundred dollars; making a total value of taxable property of sixty-five thousand and two hundred dollars, on which a tax is imposed of one thousand three hundred and four dollars.

Mr. BRISTOL: Now are you through with that?

Mr. EVANS: Yes.

Mr. BRISTOL: Now will you identify the roll, please?

A. Yes.

Q. (Mr. Evans) That is taken from page—

A. (Interrupting) This is taken from page 6782.

Q. And line?

A. Line 16.

Q. Of what?

A. Of the 1908 tax roll of Multnomah County.

Mr. BRISTOL: What kind of a tax roll?

A. This includes state, county, municipal and school district tax.

Q. (Mr. Evans) On what description of property?

A. On personal property.

Mr. BRISTOL: What is the designation of the book?

Mr. EVANS: He said personal tax.

Mr. BRISTOL: Tax roll, personal?

A. Yes.

Mr. BRISTOL: Tax roll, personal and it runs in series numbers so that those pages just follow along through the whole roll?

A. Yes

Mr. BRISTOL: From A to Z?

A. That is right.

Q. (Mr. Evans) Has any part of that tax been paid?

A. No part of the tax has been paid.

Q. Here is the next one.

Mr. BRISTOL: We can probably expedite it a little, if you don't mind. I don't want to cross-examine your witness until you get through.

Mr. EVANS: Yes.

Mr. BRISTOL: Have you been in the office all the time since 1908?

A. Yes, sir.

Mr. BRISTOL: You have been one of the Sheriff's deputies, haven't you, for years?

A. Yes.

Mr. BRISTOL: Did you, or do you know whether the Sheriff did, ever notify the receiver of this personal property tax other than by the petition which is filed in this court? Can you say that?

Mr. EVANS: Objected to as incompetent, irrelevant and immaterial.

Mr. EMMONS: Let me refresh his memory here. Perhaps he could tell by looking at this.

Mr. EVANS: This is not from his office.

Mr. EMMONS: I didn't know but what he might know about it.

The COURT: You may answer the question.

A. There is a check mark here, which indicates that a notice has been mailed. We do that in all cases where notices are mailed.

The COURT: Simply a check mark?

A. A check mark; yes.

The COURT: What is the red check?

A. I just marked that so as to identify this particular item.

Q. (Mr. Evans) Then I will show you another

book that you have produced here and ask you to state what it is.

A. This is the personal tax roll for the year 1909, of Multnomah County.

Q. That includes taxes for what purposes?

A. It includes taxes for state, county, municipal and school district, and other purposes.

Q. And I will ask you to state whether or not there appears an assessment against the Title Guarantee & Trust Company there, and if so, on what line, and read it.

A. There is an item appearing on page 6708, line 46, assessment in the name of Title Guarantee & Trust Company, R. S. Howard, Junior, Receiver; address, Second and Washington; itemized as follows: Merchandise, stock in trade, \$40,000; furniture, household furniture, and so forth, \$1,500; making a total valuation on taxable property, personal, of \$41,500, upon which is imposed a tax of \$747, and of which no part has been paid.

Mr. BRISTOL: Mr. Evans, pardon me just a moment.

Mr. EVANS: Yes.

Mr. BRISTOL: With reference to this, your Honor, I call the witness' attention to the fact that item on line 46 seems to be entered in a different color ink and at a subsequent time to when the roll was written up. Can you tell me anything about that?

A. I don't know any reason why that was done.

Mr. BRISTOL: It shows on its face, does it not?

A. It shows that it is not in its proper order. I

will say that.

Mr. BRISTOL: And it shows the actual color of the ink?

A. There is an asterisk here, which calls attention to the fact there is something appearing below which should have been included in this particular place.

Mr. BRISTOL: Well, that is what I am asking you.

A. Yes.

Mr. BRISTOL: Can you tell me why, if that assessment was made as it is intended to appear there, it was not made when the tax roll was written up?

A. No, I don't know why.

Mr. BRISTOL: You don't know?

A. No.

Mr. BRISTOL: You only got this from the Assessor?

A. Yes, sir.

Mr. BRISTOL: He wrote up the roll and it came into your possession as one of the clerks in the county tax collector's office, and this was the condition in which it came to you?

A. That is true.

Mr. BRISTOL: And was the Title Guarantee & Trust Company and R. S. Howard, Receiver, put on there after this roll was in the possession of the tax collector?

A. This tax roll is just as it came from the County Assessor.

Mr. BRISTOL: The Assessor?

A. Yes, sir.

Mr. EVANS: Maybe, Mr. Bristol, we can find out whose handwriting that is and get some explanation.

Mr. BRISTOL: I know, but I wanted to call your attention to it. That is all.

The COURT: What is this assessment above here (indicating)?

A. Well, this is another; Title & Trust Company.

Mr. BRISTOL: That is the Title & Trust Company. That is another concern, your Honor.

Q. (Mr. Evans) I will ask you to state what this book is now I am exhibiting you?

A. This is the assessment and tax roll of Multnomah County for the year 1910.

Q. What property?

A. For state, county, municipal, school district, and other.

Q. Personal or real?

A. Personal tax.

Q. I will ask you to state whether or not there appears any assessment there against the Title Guarantee & Trust Company, and if so just read to the Court.

A. There is an assessment appearing on page 6782, line 45, in the name of the Title Guarantee & Trust Company; address, 240 Washington street, Room 2 Chamber of Commerce; it has two addresses: assessment as follows, itemized as follows: Merchandise, stock in trade, \$40,000; household furniture, and so forth, \$1,500; making a total assessment of \$41,500, of which there is a tax appearing of \$913.

Mr. BRISTOL: Now Mr. Evans, with your consent I will ask this witness, so as to keep that matter straight—

Mr. EVANS: Yes.

Mr. BRISTOL: I call your attention to the fact that this last roll you identified, on line 45, item Title Guarantee & Trust Co., says that the character of its business is then banking?

A. Yes.

Mr. BRISTOL: In the year 1910?

A. Yes.

Mr. BRISTOL: And locate its place of business at Room 2 Chamber of Commerce and at 240 Washington street; is that right?

A. Yes.

Mr. EVANS: Do you know what was at Room 2 Chamber of Commerce?

Mr. BRISTOL: Pardon me; is that roll in the original condition, so far as you know, that it was in when it was received by your office?

A. It is.

Mr. BRISTOL: And this roll bears evidence that the Title Guarantee & Trust Co. item on line 45 comes in its regular order this time, doesn't it?

A. It does.

Q. (Mr. Evans) Now the 1911 roll, I will ask you to state to the Court as you have before.

The COURT: This one is included too, is it?

Mr. EVANS: 1911 my petition includes.

Mr. BRISTOL: Let's see; 1908, 1909, 1910 and 1911.

A. This is the assessment and tax roll for Multnomah County for the year 1911 for taxes on personal property. It appears on page 6891, line 27, assessment in the name of the Title Guarantee & Trust Company, R. S. Howard, Junior, Receiver; character of business, safe deposit vaults; address, 2 Chamber of Commerce; itemized as follows: Merchandise and stock in trade \$40,000; household furniture, and so forth, \$1,500; making a total assessment of \$41,500, on which there is a tax of \$1,012.60.

Q. Have any of the taxes been paid about which you have testified?

A. None of them have been paid, no.

Q. Do you know what all is included under the headings household, and what is this tabulation?

A. Merchandise and stock in trade.

Q. Merchandise and stock in trade.

Mr. BRISTOL: Just a moment. Now that is objected to upon the ground that the assessment roll is an instrument which is fixed and certain, so far as the authorities have established it, and no parole evidence can be given to vary it in any way, shape or form. Merchandise and stock in trade are English words, having a certain and definite meaning; household furniture or office fixtures likewise; and no parole evidence is permissible to attach any other or different meaning thereto.

The COURT: You may answer the question.

A. I don't know of my own knowledge, except that it refers to statement which is a permanent record in the Assessor's office.

Q. That is the statement that is sent out for the person to make his return on, if he chooses to make it?

A. Yes.

The COURT: That does not include money, notes and accounts?

A. There is no item in this particular assessment under that heading.

The COURT: Well, I say merchandise and stock in trade does not include money, notes and accounts?

A. No.

Q. (Mr. Evans) Just read into the record, will you, please, what the different headings are that go to make up the personal tax roll, showing how you segregate all personal property and enter it on the tax rolls under what headings.

A. Merchandise, stock in trade, one item, machinery and equipment, railroad bed, under which is a division made for a segregation, showing the number of miles and the valuation; rolling stock is another item, which has also a provision made indicating the number of miles and the valuation; telephone and telegraph lines, with the same segregation as on railroad bed and rolling stock. Money, notes and accounts, shares of stock, value of farm machinery, implements, wagons and so forth; household furniture, and so forth; number of horses, value—and their value; number of cattle and their value; number of sheep and their value; number of swine and their value; number of dogs and their value; then a column showing total value of taxable property.

The COURT: I don't think it is necessary to go

into that.

Mr. EVANS: I just wanted to have the Court understand what all has been provided, or what headings.

Q. State whether or not you can tell from an inspection of these records whether notices were sent to the receiver of these taxes?

A. It is a procedure followed out by the Sheriff's office to make a check mark opposite each item immediately after a statement has been mailed.

Q. You don't know, of course, whether that was mailed to Mr. Howard as receiver, or just to the Title Guarantee & Trust Company at these different places?

A. Probably addressed to the address as given on the tax roll.

Mr. BRISTOL: What address is that?

A. 2 Chamber of Commerce, showing on the 1911 roll.

Q. (Mr. Evans) Does the 1911 roll—did you read all that was itemized there?

A. Yes.

Q. Safe deposit?

Mr. BRISTOL: Yes.

Mr. EVANS: That is all.

Cross-Examination.

By Mr. BRISTOL:

Q. But the 1911 roll just read, and to which Mr. Evans has called your attention, does not purport to assess the receiver, does it?

A. Now I could not say.

Q. Well, state what the fact is; under the name of the taxpayer it obviously puts the name Title Guarantee & Trust Company, doesn't it?

A. Yes, sir.

Q. Is that what it shows there?

A. Yes.

Q. And outside of that is, in brackets, R. S. Howard, Jr., Receiver, isn't it?

A. Yes.

Q. And then it says after that, safe deposit vaults, doesn't it?

A. Yes, sir.

Q. Then it says underneath—is that supposed to be relative to this item below, or the same item?

A. Titles and abstracts.

Q. This (indicating). That is another party, is it?

A. Yes.

Q. So all you have in here is safe deposit vaults?

A. Yes. That is, under the character of business is safe deposit vaults.

Q. You were not assessing this as a banking institution this time, were you?

A. We didn't make the assessment.

Q. Well, I mean so far as that assessment roll comes to you it don't purport to be an assessment on a banking business, does it?

A. Why, it is not itemized sufficiently that I can answer that question.

Q. Well, it don't show to you, nor to anybody else

that would examine it, would it, from its face, that it was upon a banking business, notes and accounts and evidences of indebtedness, that entered into banking business, does it?

A. Not unless you mean to use different items.

Q. No. Well, the different items are not entered, are they?

A. Except merchandise and—

Q. (Interrupting) And stock in trade?

A. And stock in trade.

Q. Now I call your attention to the fact that on the previous roll of 1910 there is no mention of the name of the receiver at all, is there?

A. No, it is not mentioned.

Q. I call your attention to the one before that, which was in 1909, and after the name of the Title Guarantee & Trust Company is inserted along on the same line written afterwards R. S. Howard, Junior, Receiver?

A. That is true.

Q. Now on that particular year I call your attention to the fact they gave the address as Second and Washington street?

A. Yes.

Q. But in 1911 they gave the address as Number 2 Chamber of Commerce?

A. That is true.

Q. Don't you know, as a matter of fact, that the safe deposit vaults of the Title Guarantee & Trust Company, that is, explicitly of the Title Guarantee & Trust Company, had been previously sold and that the

records of this Court so show?

A. I did not know that.

Q. But if the fact be that the records of this Court show that previous to 1911 the safe deposit vaults were sold and in the hands of independent persons, then the nomenclature here, safe deposit vaults, would not accurately apply to the Title Guarantee & Trust Company, would it?

A. If I make that assumption I presume I would have to follow that conclusion.

Q. That is what I mean. If that be correct. I am not trying to mislead you.

A. Yes.

Q. If the fact here is that this Court authorized its receiver prior to the year 1911 to sell its safe deposit vaults and these safe deposit vaults were in the hands of other people, then this nomenclature here under the head of character of business, safe deposit vaults, would not apply to that particular item on line 27, would it?

A. No.

Q. Now you said something about statements. Your theory is, and I understand you not to express any actual personal knowledge about it, that this Assessor makes up this roll and gets this forty thousand dollars from what you assume to be a precedent statement furnished to the Assessor by the person whose name is on this roll; is that correct?

A. That is correct.

Q. In other words, the theory of the law seems to be that the Assessor leaves with every property hold-

er a statement blank upon which he is to fill out his personal property subject to taxation.

A. Yes.

Q. And return that to the Assessor and upon that the Assessor enters his name and the valuation of that personal property; is that correct?

A. Yes.

Q. Now suppose that the property owner does not return that statement and don't make the statement, then what does the Assessor do?

A. The law provides, the statute provides that the Assessor regularly make an arbitrary assessment.

Q. An arbitrary assessment; and so far as Multnomah County and the City of Portland and the State are concerned, that Assessor acts at his peril, does he not, as to whether he gets the right person named on there, don't he?

The COURT: That is a question of law.

Mr. BRISTOL: I beg your Honor's pardon?

The COURT: I say that is a question of law.

Mr. BRISTOL: I think perhaps it is, but I want to see if any change—

Mr. EVANS (interrupting): I think the statute does not make any difference, Mr. Bristol.

Mr. BRISTOL: I think it makes this difference: What I am trying to arrive at is, if there is any method or management in the tax collector's office or the Assessor's office, that this witness knows about, that would change the application of that rule of law, I want to be advised of it.

Mr. EVANS: Have you a question in?

Mr. BRISTOL: Yes, I asked the question before, but I wanted the Court and counsel to understand why I ask it. Suppose he gets the name wrong, now what is the method of transaction of business by which they collect the county, state and municipal taxes with reference to that person.

Q. In the method of your transacting tax collecting business as applied to the specific property you intend to assess, suppose this forty thousand dollars was assessed there in the name of W. C. Bristol, would that be my tax?

A. It would be, in so far as the collection was concerned, unless we had advice from the former—

Q. Yes.

A. From the officer in whose custody the roll was.

Q. Yes. In other words, you don't claim for that assessment roll any virtue by reason of the way you transact business and render these statements, other than appears on that assessment roll itself, do you?

A. That is true.

Mr. BRISTOL: That is all.

Re-direct Examination.

By Mr. EVANS:

Q. Mr. Huckabay, if that had been assessed to Mr. Bristol and you undertook to collect from Mr. Bristol, is there any provision of law whereby when he makes known the fact that he does not own that property that you can correct the assessment roll?

A. Yes. That is, we are allowed to make a correction. There is a special statute providing for the

officer in charge of the tax roll to make the proper correction to conform to the facts.

Q. Yes; whenever the proper showing is made?

A. Yes.

The COURT: Suppose it should turn out that the Title Guarantee & Trust Company were possessed of no merchandise and stock in trade, do you think the Title Guarantee & Trust Company should apply to the Sheriff for a correction?

A. Yes, at that time.

Mr. BRISTOL: And suppose the Title Guarantee & Trust Company at that time was not doing business, had no actual entity in the sense of having a corporation or anything of the kind that was active through its officers, and was itself a dead thing, then what?

A. It is a point that is difficult for me to answer, because I haven't gone into it thoroughly. The fact of the matter is we have several cases pending.

Mr. BRISTOL: And this is rather a test case, isn't it?

Mr. EVANS: Your position is, the officer in charge would do his duty and make the showing to the Court?

WITNESS: Yes.

Mr. BRISTOL: That is a presumption of law all right enough but I am trying to get at the fact, what he would do if a certain particular thing would happen.

The COURT: Are you through with this witness?

Mr. BRISTOL: Yes, I am through.

The COURT: I want to inquire whether or not when the Assessor makes the assessment, the property holder not having made the return, whether or not he makes up a slip and files that?

A. He makes up the same sort of a statement, the same form that would be returned by the property holder and files it.

The COURT: Well, I understand you sent out, or the Assessor sent out to the property holder blank slips, blank forms?

A. Yes.

The COURT: And if the property holder makes his assessment, why that blank form is filled out and sent in?

A. Yes.

The COURT: But if he does not make the assessment, or if the property holder does not so return his assessment, does the Assessor take a slip of the same kind and make the assessment himself in that way?

A. He does; yes.

The COURT: Very well. And that slip is filed in the office?

A. It is filed with the others.

The COURT: Have you those slips?

Mr. EVANS: Why, I asked the Assessor this morning to bring them down, but he misunderstood me, thinking I wanted the last one of the assessment roll, and I have asked him now to get all of them, but I have only one here. They will all be here this afternoon. The Assessor will testify about that.

(Witness excused.)

G. R. FUNK was next produced as a witness on behalf of Petitioner, and having been first duly sworn, testified as follows.

Direct Examination.

By Mr. EVANS:

Q. Mr. Funk, what official position do you hold in the County of Multnomah?

A. Chief of the field work.

Q. In what office?

A. The County Assessor's office.

Q. How long have you been connected with the Assessor's office of Multnomah County?

A. About nine years.

Q. And you are familiar with the tax records of the office?

A. Yes, sir.

Q. Will you tell the Court the method of assessing personal property, please?

A. The method of assessing personal property, on the first day of March deputies are assigned certain territories and they take blanks similar to the one that the Judge has. They go to everybody in the county, taking the town or addition by blocks, pass to everybody and leave a blank statement with them to be filled out, at the same time taking their name and address. In two or three or four weeks afterwards the deputy retraces his steps and in the meantime whatever assessments have been sent in or whatever statements have been filled out he checks them off of his list each morning so that he will not duplicate or

go to anybody that has already sent in a statement and he retraces his steps and goes over and asks for statements from those who have not sent in their statements already. That is sometimes done as much as three times, or sometimes gone over at least three times, in order to get people to make the statements themselves. If after repeated demands to get statements from the people they fail, then to make a statement the Assessor makes an arbitrary statement of the property that they have, to the best information that he has at hand, whatever it is. Then just preceding the time of the Board of Equalization, at the time that he turns over the roll to the Board of Equalization he sends out written notices to each and every person who has failed to make a statement themselves. When they are made from the information that the Assessor has, or, in other words, as we call it, arbitrarily, we place an N in there to notify, and the date of notification is stamped on the blank, which in this case was October 14th, 1911. We notified them that they were assessed, what they were assessed for, the different items, and that the Board of Equalization met at a certain time; that if they were not properly assessed that they had a right to appear before the Board and make their objections.

The COURT: Does that notice give the items?

A. That notice gives the absolute items.

The COURT: That were assessed against the parties?

A. That were assessed against the parties.

Q. (Mr. Evans) Now for instance, that slip you

have there, let's identify that and get it in evidence. What is that slip you have there?

Mr. BRISTOL: Yes, I think it would be very wise.

A. This is an arbitrary notice of arbitrary assessment made. This is simply a memorandum. This is what the Assessor makes up the assessment roll from, as I understand it. This (indicating) is really the legal part of the proposition.

Mr. BRISTOL: What do you mean by this? You put your hand on this? The book?

A. The assessment roll is, really.

Mr. BRISTOL: The book?

A. The book.

Mr. BRISTOL: That is the legal part of the proposition?

A. As I understand it.

Mr. BRISTOL: Yes.

WITNESS: Now then, in order to make up a roll, either of personal or real, why there must be evidence gathered and put together to make up the roll. As an example, if we are making up a real roll we put the values of the ground on maps and from that place it into books. Now for the personal, we place it on a personal statement like this and from these they are written into books. They are inserted in alphabetical form, so far as the personal is concerned. After all of these statements are in they are placed in alphabetical order, and from that all of those in A, beginning with A, are written in the A book, and the same with B, and so forth, and T in the T book. So that this is the memorandum from which the roll is made.

Q. Now this slip of paper I hand you here, what is it?

A. That is a personal blank for 1911.

Q. Showing what?

A. The personal assessment of the Title Guarantee & Trust Company, R. S. Howard, Receiver.

Mr. BRISTOL: Made out by whom?

A. Made out by a deputy named Shipley.

Mr. BRISTOL: Not made out by Mr. Howard?

A. Not made out by him. It is an arbitrary assessment.

Mr. BRISTOL: An arbitrary assessment?

A. If it was made out by Mr. Howard I presume we would have no contention, because he would make it himself.

Mr. EVANS: The slip will be offered in evidence and I ask to have it marked Intervenor's Exhibit.

Mr. BRISTOL: Objected to, any more than it is a mere exemplar of the witness' testimony, and objected to on the ground it is not substantive evidence to prove any fact in the petition, and therefore incompetent.

Mr. EVANS: The purpose of it is it is offered in connection with the explanation made of the manner of making assessments.

The COURT: Objection overruled.

Thereupon said paper was marked,

INTERVENOR'S EXHIBIT 1.

Q. (Mr. Evans) Now refer to the tax roll for 1911, Mr. Funk, and to the item about which there has

been testimony concerning the assessment on line 27.

A. Yes, sir.

Q. And explain, if you can, what the term safety deposit meant on that line on the assessment roll.

A. That is simply an explanation of what was assessed.

Mr. BRISTOL: Of what was assessed?

A. Yes, sir. It is an explanation of what was assessed. The \$40,000 is assessed as a value placed on the safety deposit vault located at number 2 Chamber of Commerce. That is the value.

The COURT: You call that merchandise?

A. Yes, sir, call it merchandise.

Q. (Mr. Evans) And this petitioner's exhibit, the slip of arbitrary assessment, does that state what sort of business the concern was engaged in at that time?

A. Yes, sir; safety deposit vaults.

Q. There are no other items entered? Was there anything else on that?

A. Yes. There was fifteen hundred dollars for office furniture.

Q. Do you know where that was?

A. I presume at 240 Washington street, on account of the address here. We always give, if there is more than one address, make them put the two addresses on the statement, and 240 Washington street here is presumably where the office furniture was located, at 240 Washington street.

Q. That is the office of the old Title Guarantee & Trust Company?

A. Yes.

Q. Anything else you want to look at?

The COURT: Well, he has explained—maybe you are going to ask about it.

Mr. EVANS: No. I was going to take another roll.

The COURT: He has explained that the merchandise, stock in trade, means safety deposit vaults, and that appears on the roll of 1911.

Mr. EVANS: Yes.

The COURT: Now it does not appear on other rolls as to what that is. Here, for instance (indicating).

Mr. BRISTOL: Roll of 1910 the Court means.

The Court: Yes.

Mr. BRISTOL: Line 45.

WITNESS: Line 45 was not written in there. That was simply written in the 1911 roll as more explicit. That is all.

Mr. BRISTOL: You don't write the name "receiver" here either on line 45 in the 1910 roll.

The COURT: Just a moment. You can answer that question.

A. No, it is not written here.

Mr. EVANS: Can you tell from these rolls? Mr. Emmons suggests it is on the next page; that is Title & Trust Company.

WITNESS: No; that is a different concern entirely.

Q. Can you tell from the slips that you say are made preliminary to the items on the assessment roll what was included?

A. Yes, sir.

Q. Will you have those slips here this afternoon then?

A. I will try to get them. They are put away in boxes in the basement at the Court House. They become quite accumulated in the office and they put them away in boxes down in that basement and it is pretty hard to get at them.

Mr. EVANS: It is important, Mr. Funk, because some of this property has been sold by the Receiver, as Mr. Bristol has indicated, it will be very important.

Mr. BRISTOL: The records of the court so show. I will advise you of that now.

WITNESS: This is evidently made on the same basis. I know forty thousand on the vault and fifteen hundred on the furniture; just the same.

The COURT: Well, let me inquire what the time was when those vaults were sold.

Mr. BRISTOL: Your Honor, I will furnish you that date absolutely.

The COURT: It has been three or four years ago, hasn't it?

Mr. BRISTOL: It has been quite a while; yes, your Honor.

Mr. EVANS: Well, find that down there.

Q. Then in the 1909 roll?

A. The forty thousand dollars for the vault and the fifteen hundred dollars for the furniture, just the same.

Mr. BRISTOL: That is still safe deposit vault?

A. R. S. Howard.

Mr. BRISTOL: Now, Mr. Evans calls my attention to a question I asked of the previous witness on the stand. I notice this roll here is written up in one handwriting, and opposite line about 10 there is an asterisk, and the previous witness said that that indicated that it carried your attention to the foot of the roll and there we find, "Title Guarantee & Trust Co., R. S. Howard, Jr., Rec'r.", apparently entered in a different hand, perhaps in the same handwriting, I am not able to say, but it is different ink.

A. It is different handwriting, too.

Mr. BRISTOL: A different handwriting, too?

A. Yes, sir.

Mr. BRISTOL: Do you know anything about that?

A. Yes, sir.

Mr. BRISTOL: Can you tell me about it?

A. Yes, sir. Presumably, without any question, in sorting, if they happened to be sorted wrong—everybody makes mistakes, and we don't always get them in alphabetical order, and when we write them if they are in the wrong place, why then they are written at the bottom of the page where they should be in alphabetical order, and the asterisk is put there to call attention that here is the point where it should have been.

Mr. EVANS: That is, that item should have been entered up here?

A. In looking for Title Guarantee & Trust Company naturally he would look alphabetically for it and

naturally would find it here. When he does not find it here he sees the asterisk and looks at the bottom and finds there it is.

Mr. BRISTOL: The question was, when was that put in?

A. I could not tell you when it was put in. It was put in by the chief deputy at the Assessor's office at the time. It is in Maxwell's handwriting.

Mr. BRISTOL: That is what I thought.

Q. (Mr. Evans) But the point we are after is the difference in the handwriting between R. S. Howard, Receiver, and the other. That of R. S. Howard, Receiver, seems to be in a different handwriting than the entry Title Guarantee & Trust Company.

A. Yes.

Q. Do you know anything about when R. S. Howard, Receiver's name was put in there?

A. Sometime of course prior to the time it was turned over to the Board of Equalization.

Q. You don't know when that was?

A. I don't know the date.

Mr. BRISTOL: Whose writing is that? Do you know?

A. Maxwell's.

Mr. BRISTOL: That is Maxwell's writing?

A. Yes.

Mr. BRISTOL: Is that Maxwell's writing, too (indicating)?

A. Yes.

Mr. EVANS: Now Title Guarantee & Trust Company. That is not getting it in the record.

Mr. BRISTOL: Well, that is not Maxwell's writing (indicating), is it?

A. I don't think it is.

Mr. BRISTOL: No; but this is, the words "R. S. Howard, Jr." is Maxwell's writing?

A. Yes, sir.

Mr. BRISTOL: You don't know whose writing that is, do you, the words there, "Title Guarantee & Trust Co."?

A. No. I could tell by looking back over our records who wrote the book.

Mr. BRISTOL: Well, the point you are sure about, however, that was placed on there, it was placed on there as it now appears and at different times, and at any rate, that forty thousand relates to the safe deposit vaults and nothing else?

A. However, the same man that wrote this wrote this (indicating), the address.

Mr. BRISTOL: You say the same man that wrote what,—R. S. Howard, Jr., Receiver?

A. Wrote this (indicating).

Mr. BRISTOL: Wouldn't you say that the same man that wrote "Second and Washington Street" wrote "Title Guarantee & Trust Co."?

A. No.

Mr. BRISTOL: But the man who wrote R. S. Howard, Jr., Receiver, is a different writer than the fellow who wrote Second and Washington Street?

A. I don't think so.

Mr. BRISTOL: Don't you think, Mr. Funk, these particular items, line 46, page 6708 of the 1909 roll,

visibly shows that the Title Guarantee & Trust Co., Second and Washington, are written by the same person, but that the phrase in between "R. S. Howard, Jr., Receiver," is written by somebody different?

A. No, I don't think so.

Mr. BRISTOL: Well, look at the figures and see if you can tell.

A. Well, the figures are put in by the same one that wrote this and that (indicating).

The COURT: That is R. S. Howard?

A. And the reason how that can be, I can tell you just how that is; that sometimes some of the bigger concerns in the city, and sometimes not some of the larger ones but as a rule the larger ones in the city are being investigated by the Assessor himself in regard to their value, and there is simply what we call a dummy placed in the proper place, with simply the name of the concern on them.

Mr. EVANS: Oh, yes; so as to hold its position?

A. So as to hold its position; and then afterwards the address and the amount is filled out when the property, when it is properly turned over by the Assessor to be filled in.

Q. But the point we are making here, it seems to me all of us are somewhat of the impression, except you, Mr. Funk, that the Title Guarantee & Trust Co., Second and Washington, and the figures all look more alike there in the same handwriting.

A. No. The figures are Mack's figures.

Q. They are?

A. Yes.

Q. You are familiar with them?

A. All you have to do is look at your fours and fives all the way up and down the page to find it is not the same.

Mr. BRISTOL: Well, what I want to get at, Mr. Funk, is, you testify now R. S. Howard, Jr., Receiver, is entered in Maxwell's handwriting; is that correct?

A. That is my judgment, it is Maxwell's handwriting. I believe it is.

Mr. BRISTOL: And Maxwell was who?

A. He was the chief deputy in the Assessor's office.

Mr. BRISTOL: Where is he now?

A. He is in the city.

Mr. BRISTOL: Is he still connected with the Assessor's office?

A. He is not.

Mr. EVANS: Do you know where he is working?

A. No, I don't.

Mr. EVANS: Then in the 1908 roll, I believe you examined at line 16. I will ask you to examine that roll and state if you can what items went to make up the roll under the heading of Merchandise and Stock in Trade.

A. Well, of course the deposit vault was included in it, and notes and accounts and other stuff, other merchandise was included into this.

Mr. BRISTOL: How do you know that? Why do you say "of course"?

A. From the value.

Mr. BRISTOL: What?

A. From the value of it.

Mr. BRISTOL: I know, but you are just making a speculation, Mr. Funk, from what you see there, and based upon the method and manner of doing business. Now, it is a very important matter for us to know.

A. I think we will have it here this afternoon.

Mr. BRISTOL: How is this sixty-two thousand made up? Well, is that an arbitrary assessment?

A. Well, I could not tell you from this book whether it is or not.

Mr. BRISTOL: What can you tell from?

A. I can tell from the slips.

Mr. BRISTOL: From the slips?

A. Yes. I think it is an arbitrary assessment, because there is a letter here I think that will show conclusively it was an arbitrary assessment.

Mr. BRISTOL: Yes. I think I know about the letter. You have got the rest of them, have you?

Mr. EVANS: I don't know whether there are any more or not. Were you able to find any more?

WITNESS: I don't know whether there are any more. There might be more, but we were unable to find them.

Mr. BRISTOL: Let's see if we can get this settled so we can expedite the matters. You can find the slips. Can't it be stipulated between us on every occasion when the Receiver was notified by the Assessor, that the Receiver always claimed the property exempt for causes and reasons therein set forth, and that you have a letter of July 13th, 1908, which would seem to be a reply to the Receiver, saying that the

Assessor would not allow his exemption claim, so we can get the whole thing in? Because, as a matter of fact, the Receiver did do that all the time; and it will save digging up a whole lot of records and it will save one point, which is, you have claimed that they made the arbitrary assessment and notified them. Now that notice would apparently be of some value. I want to show, which would be a part of our case naturally that that letter on its face shows, and that you all the time were notified, I mean your Assessor, so far as we are concerned we were claiming, as we claim now, this stuff so assessed was not assessible in the manner and method you assessed it and the property in the hands of the Receiver was exempt. You know that to be the course of the correspondence, don't you?

WITNESS: I believe that is the truth.

Mr. BRISTOL: Yes.

Mr. EVANS: This letter here indicates that Mr. Howard had previously—this is the copy from your office record, is it?

WITNESS: Yes, sir.

Mr. EVANS: Had previously taken the matter up with your office some way or other, either by correspondence or letter—

WITNESS: (interrupting) Either by phone or by letter.

Mr. EVANS: (continuing) And of course I suppose he would not waive his contention as to that.

Mr. BRISTOL: No, he didn't. I will tell you, furthermore, I will give you this assurance, the Court

and counsel: I advised with Mr. Howard all the time and I think his evidence will show, when I produce it, that he will advise the Court and counsel that he followed his counsel's advice.

Mr. EMMONS: Then it will be stipulated that he knew every year that they were attempting, or were assessing his property?

Mr. BRISTOL: He knew every year that they attempted to make these particular assessments in this particular way, and he was constantly claiming that the property was exempt.

Mr. EMMONS: That is what I understand.

Mr. BRISTOL: Yes.

Mr. EMMONS: He knew they were attempting to assess the property in the manner that they have assessed it.

Mr. BRISTOL: In the manner it shows on the rolls, but the Receiver was continuously objecting that that was not an assessment and that he was exempt therefrom.

Mr. EVANS: I will ask to have the letter copy of June 3rd, 1908, R. S. Howard, Title Guarantee & Trust Company—is that a copy from your office files?

WITNESS: Yes, sir.

Mr. EVANS: I will ask Mr. Howard if he can find the other.

Mr. BRISTOL: I think perhaps we can, but we admit we got it. I am not making any contention about that.

Mr. EVANS: I ask to have it copied in the record.

Mr. BRISTOL: Sure. And it will be understood

between us there are other letters, as Mr. Funk has testified, both pro and con, from the Assessor to the Receiver, and from the Receiver back, with reference to the same contention.

Thereupon by agreement said letter was received and set out herein as follows:

“B. D. SIGLER, ASSESSOR,

Multnomah County, Portland, Oregon.

July 13, 1908.

Mr. R. S. Howard, Receiver,

Title Guarantee & Trust Co., City.

Dear Sir:

I am unable to find any law wherein the personal property of the Title Guarantee & Trust Company, in your hands, as Receiver, March 1st, 1908, is exempt, since the law reads: ‘All real property within the State and personal property situated or owned within this state, except such as may be specifically exempt by law, shall be subject to assessment and taxation in equal and ratable proportion.’

“Since there is no provision exempting property in the hands of a receiver or any court, there can be no question about the property mentioned being subject to taxation, and I herewith enclose you blank, which please fill out and return to me at your earliest convenience.

Yours very truly,

Assessor.”

The COURT: There was no contention ever made that the Receiver ever had no such property as is mentioned in the tax rolls?

WITNESS: No, sir, not to my knowledge.

The COURT: I think the Court will take an adjournment now until two o'clock.

Mr. BRISTOL: May it please the Court, before your Honor retires, I might save Mr. Evans some trouble. I am willing to concede this much, if he wishes me to, and to save the hunting in that basement Mr. Funk spoke about. I am willing to concede to you that the Assessor attempted to make arbitrary assessments after receiving notice that this particular property was not bound, and that the result of those assessments appears to be as shown upon the rolls that you have introduced, without conceding that the name R. S. Howard, Jr., Receiver, as written in there was properly written in. You see what I mean? But I don't want you to go hunting up all those files.

Mr. EVANS: I think we ought to have them, because they may help explain what made up those items. If they can find them I prefer them to do it.

Mr. BRISTOL: Well, that is for your own convenience.

Thereupon, a recess was taken until two o'clock p. m. of this day, Wednesday, November 26th, 1913, at which time court reconvened and the trial herein was resumed as follows:

G. R. FUNK resumed the witness stand and further testified as follows:

Direct Examination (continued).

By Mr. EVANS:

Q. We asked you to make a search for the records to see if you could find the other statement of assessable property.

A. Yes, sir.

Q. Did you succeed in finding any others?

A. I found one more.

Q. For what year was that?

A. 1910.

Q. This is it you produce here, is it?

A. Yes, sir.

Q. That covers the assessment that was made in 1910?

A. 1910, yes, sir.

Mr. EVANS: I will offer it in evidence.

Thereupon, said paper was received in evidence without objection and marked,

INTERVENOR'S EXHIBIT 2.

The COURT: Do you keep all of these slips on file?

A. Well, they get to be pretty bulky and they are put in boxes and put in the basement of the Court House and the janitors pile stuff around over them and they are pretty dirty, and we had to go through a great big lot of junk to get these.

Q. (Mr. Evans) Are they still looking for the others up there?

A. No. They quit.

Q. They could not find them?

A. Well, they are there, but then just where. They are not really the record anyway, as far as that is concerned. They are simply what the record is made from.

Q. Explain please what that double "A" means opposite those items that have been entered there, the amount of the assessment.

A. Well, the double "A" means it is arbitrary assessment and written in red means that it was taken off the statement the year before; that it was arbitrarily made the year before and that is the amount it was assessed at the year before, in 1909, forty thousand dollars for the safety deposit vaults, written in red too, and fifteen hundred dollars for the furniture.

Q. So virtually then this exhibits the assessment for 1909 as well?

A. It does, yes.

Q. In the 1908 assessment roll it appears, as I recall it, the first item was some sixty-five thousand dollars.

A. Some, and I don't remember how many.

The COURT: Sixty-two thousand.

Mr. BRISTOL: Sixty-two thousand five hundred.

Mr. EVANS: Sixty-two thousand five hundred dollars besides the personal property; besides the fixtures, I should say.

Q. Do you know whether or not the safety deposit boxes were assessed?

A. Yes, sir.

Q. In that item?

A. They were included in the assessment.

Q. And what else, if you know, went to make up

that value of the property?

A. In 1908 the assessment included also the plant; that is the books.

Q. What plant did they have there?

A. Well, they had a set of books for searching titles. They had a plant there for an abstract plant.

Q. You mean an abstract plant?

A. Yes, sir. They sold it in some place about August 1st, 1908, to the Title & Trust Company, which has it now. They went in business on the 1st day of August, 1908, and it was about that time, I don't know for sure, I didn't get time to look up the bill of sale, but that is the time that they went into business, on the 1st of August, 1908, and they purchased this plant.

The COURT: Who purchased this plant?

A. The Title & Trust Company. It is now in the Lewis Building. They are another abstract company and guarantee company.

The COURT: They purchased it from the Title Guarantee & Trust Company?

A. Presumably from Mr. Howard, but it was the plant that the Title Guarantee & Trust Company had.

Mr. EVANS: You mean they bought over their abstract books and outfit for making abstracts?

A. Yes, sir.

Mr. EVANS: Bought that from the Title Guarantee & Trust Company. Do you think of anything else, Mr. Emmons?

Mr. EMMONS: I think that is all.

Cross Examination.

By Mr. BRISTOL:

Q. Did you find out, and refresh your memory about that R. S. Howard, Jr., Receiver business?

A. No, I didn't look any further in regard to it, Mr. Bristol.

Q. I will call your attention to Intervenor's Exhibit 2 and ask you if I understood you correctly that this red shows that the same sort of an arbitrary assessment would be made to the Title Company for 1909?

A. Exactly.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. It would be absolutely the same. The red is put on there for the benefit of the assessor in making comparisons each year.

Q. I am particularly anxious to know whether the name of the receiver would be upon that assessment or that statement at all?

A. Well, that I could not tell you.

Q. Well, it is not on that one, is it?

A. No. That I could not tell you. But the amounts here are taken, these amounts here are taken from the previous.

Q. Yes, I understand that; the previous roll?

A. Yes. But in regard to the name, why, I could not tell you.

Q. Well now, this roll says, "Title Guarantee & Trust Co.," don't it?

A. Yes.

Q. "Character of business, banking"?

A. That is the item, the statement there, although the roll might include even more than that.

Q. All right; let's look at it. 6782, line 45, would represent the roll for 1910, wouldn't it?

A. Yes, sir.

Q. That is on Intervenor's Exhibit 2 and is the entry that shows that this statement was entered?

A. Yes, sir, that is it exactly.

Q. I notice on here in blue pencil, "See Maxwell before entering." What does that mean?

A. Well, evidently Mr. Maxwell asked something in regard to it. Maybe he wrote it himself. I don't know whether he did or not.

Q. Why was it that Maxwell was always the fellow that was particularly concerned here about this Title Guarantee & Trust Company tax apparently?

A. Well, that I don't know, otherwise than that he was chief deputy in the office. Otherwise I could not tell you.

Q. Now, I show you the 1909 roll at the point and place where line 46 appears, and ask you by what authority anybody would have to enter the name of the Receiver, in view of the fact that you told us this morning on your direct testimony that these entries here were made up from statements previously prepared and that this statement, Intervenor's Exhibit 2, which you say is a proper one, does not show the name R. S. Howard, Jr., Receiver?

A. Well, that would not be any reason why that they could not be added to it, because it is not a tax

roll, Mr. Bristol.

Q. Well, but I am getting at the fact that you stated—

A. (interrupting) It could not be—

Q. (interrupting) Now, wait a minute. Did I understand you correctly that the foundation for the roll itself is either a previous blank or a previous statement either actually made by the owner or arbitrarily made by the Assessor?

A. Yes, sir.

Q. Is that true?

A. That is true.

Q. Now then, it is also true, isn't it, that Intervenor's Exhibit 2, you told us was the same by reason of these red letters that you identify it by, was the same for 1909 as it was for 1910?

A. Yes, sir. These items—

Q. (interrupting) Now then, these—

Mr. EVANS: (interrupting) Wait until he gets his answer finished.

Mr. BRISTOL: All right. Go ahead.

WITNESS: These items are absolutely the same. (Indicating.) These may not be the same, because if this had changed hands and was under a different name, why, these items would appear, as this was assessment on the particular property.

Mr. EVANS: "This" and "these" don't get in the record.

Q. (Mr. Bristol) So you did have some information then with regard to the future whether the institution changed hands, did you?

A. Oh, sure.

Q. Now, as a matter of fact, it had changed hands prior to 1909, hadn't it?

A. Yes; part of it was changed hands anyway, before that.

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was constantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced, the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor makes this up, now—

Q. (interrupting) What you are referring to as “this,” is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Howard, Jr.'s. name so long as he notifies him.

Q. So long as he notifies him?

A. Yes.

Q. Have you got any proof that he ever notified him?

A. Yes.

Q. What?

A. The record shows, you know, the date of the notification, and that is the only person that he could notify.

Q. Where is the record of notification in 1909 that you notified the Receiver?

A. We haven't got it here.

Q. You haven't got it here. Did you notify the Receiver?

A. I always do.

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. Always do, because the Assessor knew—there is no doubt but what he knew the Title Guarantee & Trust Company was in the hands of a Receiver and that R. S. Howard, Jr., was the Receiver.

Q. Now, Mr. Funk, just a minute. I don't want you to make a statement that might be incorrect.

A. I don't want to, either.

Q. I know, but listen. Now let me remind you: You remember that George H. Hill was the first receiver in this court, don't you, and that he was removed?

A. Yes, I remember he was, yes.

Q. And you remember that next to George H. Hill came Edward C. Mears, who would be the receiver in the year that this assessment was made, 1909.

A. Well then, probably Mr. Mears is the man that—

Q. (interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. Well, if Mr. Mears was the Receiver at the time that this roll was turned over to the Board of Equalization, I haven't any explanation.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in the Board of Equalization in October of 1908, would-

n't it?

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not the 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. In other words, then, if that be the case, there is twelve months yet in our favor that I didn't know about. The roll for this year of 1913, for instance, we went before the Board as taxpayers in October, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

Q. Is that right?

A. The 1st of February.

Q. The 1st of February, yes. Now then, this 1909 roll then would not be subject to collection upon it until the following 1st of February, 1910?

A. That is correct.

Q. All right. Then let's put it this way: Can you tell me whether or not that name, R. S. Howard, Jr., Receiver, was put on there previous to the time that the Board of Equalization acted?

A. It must have been, because the Assessor does not have charge,—did not have charge of the rolls at any time after that.

Q. Well, that is not the point. That is only argumentative. Do you know what the fact is?

The COURT: Do you have any personal knowledge of that?

A. I don't know when it was put on personally, only I know that the Assessor up until this year—the law was changed this year—up until this year the Assessor did not have,—after he turned the rolls over, which will show in the back of the book the time they receipted for them, that the Assessor at no time had the rolls in his possession. Here is where his affidavit is, where he turns it over (indicating). Here is where Fields receives it (indicating).

Mr. EVANS: October 18.

Mr. BRISTOL: No; that is where it went to the Board of Equalization?

WITNESS: Exactly.

Q. It went to the Board of Equalization October 18th, 1909?

A. Well, the Assessor at no time had this book after that time. It was in the possession of either the Board of Equalization or the County Clerk or of the Tax Collector.

Q. Yes. Well now then, in view of the fact that this statement—I will put it this way to you, because I want you to give the Court the benefit of your expert knowledge on this; in view of the fact that this statement says "Title Guarantee & Trust Co. for the year 1910, "Intervenor's Exhibit 2, and that by contemporaneous facts you state that 1909 would be the same, and the fact that all of these rolls produced here except two of them, only use the name Title Guarantee & Trust Company alone, even during the time of

the receivership, please be kind enough to tell me, was it the intention of Multnomah County, so far as you know, to assess the Title Guarantee & Trust Company for what it claimed to be a personal tax, or was it its intention to assess the Receiver?

A. Well, my opinion is, that is all I can tell you—

Q. (interrupting) I didn't ask you your opinion; I want the facts, Mr. Funk. You know what I mean as to what the intention was when they put "Title Guarantee & Trust Company" on there; was it the intention to assess the Receiver or the Title Guarantee & Trust Company?

A. Well, Mr. Bristol, I wasn't the Assessor.

Q. I know, but you know the surrounding facts.

A. And what Mr. Sigler's intention was, why, it would be hard for me to swear to.

Q. Well then, I will put it around the other way. You were the chief field deputy, were you not?

A. No, not at that time.

Q. Well, you were in the Assessor's office?

A. Yes, sir.

Q. I will put it this way—

A. (interrupting) I had charge of the land values at that time.

Q. In view of your charge of the Assessor's office, if you were assessing R. S. Howard, Jr., Receiver of The Title Guarantee & Trust Company, that is the name you would put in the roll, isn't it?

A. I would, yes.

Q. And if you were assessing the Title Guarantee & Trust Company, that is the name you would put in

the roll, wouldn't you?

A. I might make a note, of course, indicating that they were bound together, just the same as—

'Q. (interrupting) Well, that is not the point I am getting at. I want to know with reference to that intention. So I think you have explained exactly what I am after. Now, how do you explain that part of the time in those rolls of 1908, 1909, 1910 and 1911, in the four instances two of them don't mention the Receiver's name at all and only one of them mentions the Receiver as an addition after the roll is apparently made up?

A. I told you that I didn't explain it, because I don't know why they didn't do that.

Re-direct Examination.

By Mr. Evans:

Q. So far as the Assessor's office was concerned, your understanding about it, it would not have made any difference whether this property was in the hands of a receiver or was still in the Title Guarantee & Trust Company's hands? What you were trying to do was to assess the property that belonged to the Title Guarantee & Trust Company?

Mr. BRISTOL: Now, I object to that upon the ground that, and I think counsel recognizes it to be more or less argumentative, involving part of the determination that this Court would have to make, and rather calling for the conclusion of the witness.

Mr. EVANS: It is probably objectionable for that reason, but I imagine there have been one or two more

questions somewhat argumentative ahead of it.

The COURT: You may answer the question.

Mr. BRISTOL: I think on cross examination I had a right to pursue it.

The COURT: You may answer the question. The Court will give it such weight as it deems proper.

A. Well, individually the Assessor's office, as I understand it, was to assess the property, all personal property that is located in the County of Multnomah, it is the duty of the Assessor of this county to assess, and if it was the Title Guarantee & Trust Company's property, why, it presumed that it was, and as I understand the law, if he made a mistake in assessing it, it is not conclusive that it should not be assessed; that the law provides for that, and that it does not make any difference whether it was assessed to the proper owner or not. To explain the way I understand it is this: If I find goods down here in a store stored away, the law recognizes that the Assessor has a perfect right to assess that property to the man who has the goods stored, without the man will make a statement himself stating who owns the goods and the value of them.

(Witness excused.)

Mr. EVANS: Mr. Howard, please take the stand.

R. S. HOWARD, Jr., was thereupon produced as a witness on behalf of the petitioner, and, having been first duly sworn, testified as follows:—

Direct Examination.

By Mr. EMMONS:

Q. Mr. Howard, you are Receiver of the Title

Guarantee & Trust Company?

A. I am.

Q. And how long have you been such Receiver?

A. Since January 21st, 1908.

Q. Did you ever have any notice from the Assessor's office that the property which you hold as Receiver was being assessed, the personal property?

A. I did.

Q. When did you first receive that notice?

A. My recollection was sometime in 1908; I mean during that year.

Q. And each year subsequent to that time did you have notice?

A. I can't recall as to a direct notice, but I can recall them leaving blank statements there, as they are accustomed to doing from house to house, or from place to place. That is the custom of the office.

Q. Each year?

A. Each year.

Q. And have you talked to the Assessor, Mr. Sigler, in reference to these taxes?

A. I did not talk to Mr. Sigler. I had conversations—I first advised with my attorney on the first assessment, with Mr. Linthicum and Mr. Bristol.

The COURT: That is 1908?

A. 1908, yes, sir; and then each recurring instance I took it up with my counsel and was under advice from them, and then I several times spoke to Mr. Maxwell, who was the chief deputy in Mr. Sigler's office, the county Assessor.

Q. Now, you paid the taxes, I believe, on the real

estate that you held as Receiver?

A. Each year, yes.

Q. Did you ever pay it on the personal property that you held as Receiver?

A. I can't recall that I did.

Q. In fact, you contended that the property was not assessable—

A. (interrupting) The personal.

Q. (continued) while it was in the custody of the Court?

A. And under the advice of counsel I acted.

Q. Under the advice of counsel?

A. Yes.

Q. Then the taxes on the personal property which you hold have never been paid, on the personal property?

A. It has not been paid.

Q. Now, what was the character of this personal property that you had on which the taxes have never been paid?

A. You mean on which the assessment was levied?

Q. The personal property that you held as receiver.

A. I don't know what they were assessing, but it was presumably on notes and open accounts and the assets of the Title Guarantee & Trust Company.

Q. Well, you had some safety deposit vaults?

A. And that is one of its assets, or was.

Q. Yes; and you have never paid any taxes on the vaults, have you?

A. No.

Q. Were you operating those vaults while you were receiver?

A. I was, yes, under the orders of this court.

Q. And for how long did you continue to operate them?

A. I sold them in August, 1911.

Q. And you had some furniture, fixtures, and so forth?

A. Office fixtures, yes; regular banking fixtures, desks and usual paraphernalia.

Q. Do you know what valuation they placed on these vaults?

A. Not in detail, no.

Q. Forty thousand dollars?

A. I don't know anything of the total assessment.

Q. I know, but would forty thousand dollars be an unreasonable amount to assess?

A. I don't know the basis on which they would assess such a holding.

Q. You don't make any contention, as I understand it, as to the amount of the assessment, but simply that they had no rights, under the advice of counsel, to assess them?

A. I have never replied to it, or investigated any further than to go into it with my counsel, and there I stopped.

Q. Did you know on what valuation this property was assessed during these years?

A. Not in detail, no, I did not.

Q. You knew in a general way?

A. Because the notices or the statements would

only carry an assessing amount, a total amount. I didn't know how it was segregated.

Q. You received these statements from the Assessor each year showing the amount the property was assessed at?

A. Well, not from the Assessor. I don't recall. I may have an instance in mind where I had such a notice from the Assessor's office, but I more particularly had notices from the Sheriff's office sending out these delinquent notices.

Q. Did you ever make any objection to the valuation on this property on which assessment was made?

Mr. BRISTOL: It is entirely immaterial, your Honor. It is not within the issues in this case.

The COURT: He may answer the question. I think these matters would probably come up hereafter, and you had better have all the testimony in.

WITNESS: What is the question?

The COURT: Did you ever object to the valuation of the property?

A. Not in detail, no. My objection was on assessment. I never went into detail.

Q. On the question of liability at all, whether the property was assessable?

A. Yes.

Q. That was the ground of your objection?

A. That was the ground of my objection.

Cross Examination.

By Mr. BRISTOL:

Q. Did you ever receive any notice from the Sher-

iff that he held a warrant for the delinquent personal property taxes and would levy upon property in your hands?

A. I did not.

Q. At any time?

A. At no time.

Q. Were you ever notified by T. M. Word, the tax collector, by R. L. Stevens, the Sheriff of Multnomah County, or by B. D. Sigler, the Board of Equalization, or any official body or official, that the property in your hands was subjected to probably levy under a warrant in the hands of the tax collector or the officers acting for him, and as such receiver you would be held liable therefor?

A. I was not.

Q. I show you four papers, which are exhibits attached to the decision of the District Attorney in this proceeding, and ask you if you ever saw them before.

A. These particular papers?

Q. Well, or any ones like them?

A. I have had documents, I have had similar sheets from Mr. Stevens' office when he was Sheriff and Tax Collector.

Q. Well, what do you mean by "similar"? Did they contain the same subject matter and the same name?

A. As near as I can—

Q. (interrupting) All right. I call your attention to the four sheets handed to you, purporting to be delinquent tax statements for the years 1908, 1909, 1910 and 1911, and ask you to look at them and tell

me whether they compared with what you saw before and whether the name of R. S. Howard, Jr., Receiver, or any demand on R. S. Howard as Receiver, was ever made for those taxes.

A. They were mailed; they were generally mailed to the Title Guarantee and Trust Company.

Q. Well, I call your attention to the fact that the papers in your possession are all Title Guarantee & Trust Company, are they not?

A. Each of these is so written.

Q. Do you see any R. S. Howard, Jr., Receiver, written there?

A. Not on these sheets.

Q. Now, what does the item in there, personal tax, refer to, do you know?

A. I do not.

Q. Were you ever told or advised?

A. I may have had a notice from the Assessor's office. I think I did.

Q. What kind of notice do you mean by "notice"?

A. A notice of the proposed assessment, the regular form they send out sometimes.

Q. Well, you mean like these in here that Mr. Funk has testified about? Is that what you got?

A. No, not these. It was just a form, the regular printed form that you have been assessed so and so.

Q. You had been assessed so and so?

A. Yes; the Title Guarantee & Trust Company.

Q. Well, was that addressed to the Receiver? The point I want to get at, Mr. Howard, now Mr. Emmons has asked a lot of general questions here that are sus-

ceptible of a certain intendment; I want to find out how far your notice went. Were you ever notified by the Assessor that the property in the Receiver's hands subject to any arbitrary assessment, was ever made at all? If so, when? I am not talking about the Title Guarantee & Trust Company; I am asking you about the Receiver, R. S. Howard.

A. I recall no instance in which I was notified as Receiver.

Q. No; you bet. Now, were you ever notified, except insofar as it may be claimed and asserted that the roll itself was notice, were you ever notified at any time, for instance in the year 1908, that merchandise and stock in trade in your hands was assessed to forty thousand dollars?

A. I was not.

Q. Were you ever notified in any year, as Receiver, that merchandise and stock in trade in your hands as an officer of this court was assessed to you, and that an obligation arose from you, as Receiver of Multnomah county thereby?

A. I was not.

Q. Was any demand ever made upon you by any of the officers of Multnomah County prior to the filing of the petitions by Mr. Emmons and Mr. Evans for any penalties or interest of any kind in connection with this matter?

A. No, excepting through these mailed notices, these delinquent notices.

Q. Well, were they to the Receiver or to the Title Guarantee & Trust Company?

A. No, not to the Receiver; no. They were to the Title Guarantee & Trust Company; not to me as Receiver.

Q. Outside of the letters you were told either by myself or Linthicum, were you not, to write to the Assessor each year and call his attention to the fact that the Federal Court was in possession of this property and that this was a winding up and liquidating suit, that the Receiver claimed that they would have to look to the Court for that assessment and the stuff in his hands was exempt?

A. I was.

Q. Did you write such letters?

A. I wrote such letters.

Q. Now, you received replies from the Assessor, such as the ones Mr. Evans had here that we stipulated about, whereby the Assessor came back and said he would not allow that exemption, but according to law all personal property was assessable? Do you recall that personal correspondence?

A. Yes.

Q. Now that is one, July 13th, addressed to R. S. Howard, Receiver, Title Guarantee & Trust Company, and it reads: "I am unable to find any law wherein the personal property of the Title Guarantee & Trust Company is exempt." Now there were a number of exchanges of letters of that kind, this one relating particularly to 1908; and refreshing your recollection in that regard, did you act in conformity with the advice of counsel and so notify the Assessor or the Tax Collector, as the case might be?

Mr. EVANS: May I interrupt just a minute? How much trouble would it be, Mr. Howard, to get those letters? Your correspondence is not very extensive?

WITNESS: Well, I commenced a search during this lunch hour, and they were still getting them out. It runs over a period of large files, you know, and they were getting them together.

Mr. EVANS: The reason I ask, I have asked the Assessor to look for all the letters up there and they haven't been able to find any letters, and Mr. Funk told me the impression he had was likely this business was transacted orally between yourself and the Assessor.

WITNESS: Oh, no.

Mr. BRISTOL: No; I know that personally.

Mr. EVANS: If you have some letters I would like to see them.

WITNESS: The letters passed, and I also spoke several times to Mr. Maxwell, met him on the street, and at one time Mr. Stevens came up and was talking to me on the street about it.

Mr. EVANS: You can get those letters, can you?

WITNESS: Why yes. They probably have them out by this time. You can phone Main 5649 and ask for Mr. Macy.

Q. I show you a letter addressed to me under date of the 25th day of January, 1912, prior to the filing of any of these petitions in here, and ask you to look at it and with your memory refreshed therefrom advise the Court what the facts are with reference to the course you took and what you did as Receiver.

Mr. BRISTOL: I admit to counsel and also to the Court, that the letter itself is not competent. I merely want him to refresh his recollection. I am not purposing to offer it later.

The COURT: Is that a letter written to you?

Mr. BRISTOL: As his counsel, with reference to this matter.

A. Yes, I remember that letter.

Mr. BRISTOL: I am not going to offer it. It just recites the fact that he is testifying to. (Counsel passed said paper to Mr. Emmons.)

Q. Now your request was that I write to Mr. Stevens, in that letter, and advise him of the contentions that we were making, when he was then Sheriff of Multnomah County, was it not?

A. It was.

Q. And you may state whether or not you received a copy of my letter to Mr. Stevens and in order to expedite matters I show you what purports to be a copy of my letter addressed to Robert L. Stevens, Sheriff of Multnomah County, prior to the time these petitions were filed, and ask you if you recognize it.

Mr. BRISTOL: And in that connection I will ask counsel if they can produce the original of that letter of January 26, 1912.

The COURT: Mr. Bristol, may I see that letter you showed to the witness?

Mr. BRISTOL: Most assuredly, your Honor. I beg your Honor's pardon. I didn't intend to offer it. It was simply to refresh his recollection. But your Honor has a right to see it, of course. (Counsel here

passed said letter to the Court.)

The COURT: Yes, I understand.

A. Yes, sir; I remember that. You sent me a copy of it.

Mr. BRISTOL: Yes. Now counsel for the Sheriff, or for the County, has what purports to be a copy of this same letter, your Honor. Now as illustrative of the matter at issue and the Receiver's attitude thereon, I offer in evidence the notice to Robert L. Stevens, Sheriff of Multnomah County, prior to the filing of these petitions herein, concerning this very matter, and ask to have it marked Receiver's Exhibit No. 1.

Thereupon said paper was marked Receiver's Exhibit No. 1.

Q. Now with reference to this matter, some time along about the 24th of January, then, as I understand it, some deputy of the Sheriff's office called upon you with reference to these delinquent, or alleged delinquent personal property taxes?

A. That was 1912.

Q. Yes; I say 1912?

A. Yes, sir.

Q. Before the filing of these petitions?

A. Yes.

Q. Then some talk ensued, and you told this deputy what you have said here, that the property was in the control of the Court?

A. In the control of the Court.

Q. And then he asked you to have a letter written to Mr. Stevens?

A. Yes.

Q. And this is the letter that you asked me to write and that you say you had a copy of, is it, Receiver's Exhibit 1?

A. Yes, sir.

Mr. BRISTOL: Now having offered that in evidence, I will read it into the record. (Reading.) "In re Title Guarantee & Trust Co."—

The COURT (interrupting): Mr. Bristol, that notice from the Sheriff, will you let me see that?

Mr. BRISTOL: Notice from the Sheriff?

The COURT: You offered one, I understood?

Mr. BRISTOL: No; that is this letter here. I didn't offer it. I just asked him to refresh his recollection.

The COURT: I have read that, but I thought you just now offered a notice from the Sheriff.

Mr. BRISTOL: No, no. I never had such notice. I never had such notice. This notice was by word of mouth, given by the deputy, as I understand it, saying, as there was some agitation Sheriff Stevens would like to be placed in position so he could show why he had not collected these taxes. That is my understanding.

(Reading) "In re Title Guarantee & Trust Co.—
State of Oregon Claims; George A. Steel, Treasurer.
"January 26th, 1912.

"Mr. Robert L. Stevens,

Sheriff of Multnomah County,

Portland, Oregon.

"My dear Mr. Stevens:—

"Noting considerable agitation relative to the mat-

ter of alleged delinquent personal property assessments, I take occasion to inform you of a condition which you may not know of and yet which may be pressed upon you:—

“All of the property, real, personal and mixed, of The Title Guarantee & Trust Company passed into the hands of the federal court for the District of Oregon on the 6th day of November, 1907. Since which time, and now, it is being administered by that court through its receivers and by the federal judges in Tacoma and elsewhere where its property is situated, solely and only for the purpose of gathering in the assets and distributing them among the various depositors and creditors. All of the property has been and is now in the custody of the law under the administration of the federal court.

“It may have happened that officers of Multnomah County, not knowing this, have undertaken to list an assessment of personal property against the Title Guarantee & Trust Company or against its receiver, or in some manner or way have undertaken to note upon the personal property records of Multnomah County a listed assessment against some of the assets of this concern or its collateral companies.

“With a view to obviating any difficulties that might arise I wish to say to you that under this situation the attitude that has governed the receivership has been one that required it to act at all times pursuant to the orders of the federal court, and as no method or step was taken in that court in reference to these matters, naturally it would not permit its jurisdic-

tion to be interfered with.

"I shall be obliged therefore if you will consider these matters and let me know if under these circumstances you notwithstanding desire to take some action so that I may relieve you of trouble and difficulty and conflict of authority between the State officials and federal court. I am convinced, however, that when you consider the matter you will see that any such assessment that may have been made would have been necessarily erroneous.

"If there is any further information or assistance that I can give you kindly let me know.

"With sincere regards, I have the honor to be

"Very respectfully yours."

Q. Now I show you a letter of September 6, 1913, and ask you to look at it, and with your memory refreshed therefrom say whether or not you took any action upon the suggestion of Henry E. Reed, Assessor, with respect to the matters and things concerned with this general tax matter.

A. I did. Following my custom, I referred these matters up to counsel.

Q. Now then, I show you a paper and ask you if in pursuance to that notice to me you received a document, and whether that in due course was acted upon, and whether that is recognized by you?

A. Yes, this was shown to me.

Mr. BRISTOL: I would like to have counsel for the County produce a letter of September 9th, 1913, to the Board of Equalization for Multnomah County.

Mr. EVANS: Is this a copy of it?

Mr. BRISTOL: Yes. That is absolutely right.

Mr. EVANS: You may offer it.

Mr. BRISTOL: I will offer that in evidence as Receiver's Exhibit 2.

Thereupon said paper was marked by the Reporter

RECEIVER'S EXHIBIT 2.

Mr. BRISTOL: (Reading) Title: "In re The Title Guarantee & Trust Company Receivership.

"September 9th, 1913.

"To the Board of Equalization for
Multnomah County, in session assembled,
Portland, Oregon.

"Gentlemen:—

"The notice of Mr. Henry Reed, Assessor, assessment roll page 6119, line 12, item 'Furniture \$500, R. S. Howard, Receiver T. G. & Tr. Co.', hereto attached, has my attention as attorney for the receiver to whom the same was referred for the purpose of respectfully representing to you that this property is incorrectly assessed for the following reasons:—

"First: The receiver is not doing business, nor is there any furniture held or owned by him separate and apart from the estate consisting of the assets in administration in the federal court for the purpose of winding up The Title Guarantee & Trust Company.

"Second. There is now pending in the federal court two separate suits or interventions, one brought under your authority or the authority of your predecessors, by Lionel R. Webster, Esquire, as to prior assessments, the decision upon which remains undetermined.

"The other was brought by District Attorney Evans in addition to and supplemental apparently to the one brought by Judge Webster. Mr. Evans doubtless acted by your authority or in his capacity as District Attorney of the Fourth Judicial District and his application is yet undetermined.

"Third. Many courts have held that a receivership in a winding up suit where the property is merely being held for the benefit of creditors and claimants, is not under a law like that of Oregon subject to personal property tax for two reasons: First, it does not come within the class of property usually subject and intended to be subject to taxation, and, secondly, it is so far in the custody of the law that the assessment and levy without specific statutory application thereto is not effective to impress a lien upon it. It is true that the proceedings already pending will determine this matter one way or the other.

"Fourth. It seems, therefore, entirely unnecessary to involve the county in another suit inasmuch as this question is already well raised and inasmuch as there is serious doubt under the law whether the property can be assessed at all or not.

"Fifth. The receiver in his own name as receiver has or holds no property at 240 Washington Street, independent of the administration in the federal court and all of this property is being turned into money as rapidly as possible for the benefit of the creditors.

"In view of these considerations your Board is asked to cancel the assessment.

"Very respectfully yours."

Q. (Mr. Bristol) I would like to ask preliminarily, is Mr. Maguire more familiar with this correspondence than you are?

A. No; I am more familiar with it.

Q. That is what I thought. Now I show you a letter, purporting to be a letter from the Assessor in 1908, April 30th, 1908, and ask you to look at it and note whether or not that letter was received by you, and whether it is in the same condition as when you received it.

Mr. EVANS: There will be no objection to these letters.

Mr. BRISTOL: I don't think so, although I want counsel to have the full benefit of all these letters.

A. This was received by me soon after my appointment as receiver.

Q. What did you do with it?

A. I turned it over to my counsel, to Mr. Linthicum and Mr. Bristol.

Q. Were you advised what to do?

A. I was, sir. There is a memorandum here carries the advice.

Q. That is just exactly as you got it, is it?

A. Yes, sir.

Q. No change on it since?

A. Not to my knowledge. It was in my files.

Mr. BRISTOL: I offer that in evidence. Mark that Receiver's Exhibit 3, please.

Thereupon said paper was by the Reporter marked RECEIVER'S EXHIBIT 3, and is as follows:

"B. D. Sigler, Assessor,

Multnomah County,

Portland, Oregon.

April 30th, 1908.

"Mr. R. S. Howard Jr., Receiver,

Title Guarantee & Trust Co.,

City.

"Dear Sir:—

"Please furnish this office with a statement showing the amount of Capital Stock, Surplus & Undivided Profits of the Title Guarantee & Trust Co. at the close of business Febr. 28th, 1908, together with a list of the Stockholders of the Bank.

"In case you wish the assessment made directly to the bank please make a written request to that effect as follows:—

" 'We would ask that you make the assessment directly to the Title Guarantee & Trust Co. for and on behalf of the said Stockholders, that the bank may directly pay the taxes; this bank agreeing to hold you harmless for any irregularity in the form of said assessment.

" 'Signed

President or Cashier.

"Yours truly,

B. D. Sigler, Assessor.

"Mr. Howard: Advise the Assessor that this property is in custodia legis Federal Ct. U. S. & not subject to assessment as a going concern. Bristol. One copy."

Q. Now in conformity with the enunciation on the bottom of that letter did you advise the Assessor?

A. I did, on the date of May 5th, 1908.

Q. Have you a copy of that letter?

A. I have a copy of it.

Mr. BRISTOL: I offer that in evidence as Receiver's Exhibit 4.

Said paper was thereupon by the Reporter marked RECEIVER'S EXHIBIT 4, and is as follows:

"May 5, 1908.

"Mr. B. D. Sigler,
Assessor,
City Hall, City.

"Dear Sir:

"Referring to your letter of April 30th, The Title Guarantee & Trust Company is in custodia legis Federal Court U. S., and is not subject to assessment as a going concern.

"Yours truly, Receiver."

Q. Now did you receive a letter of July 13, 1908, from the Assessor?

A. I did, July 13, 1908.

Q. That is the same letter Mr. Evans had in his copy book, isn't it?

A. Yes; this is the original.

Q. To B. D. Sigler. Did you reply to that letter?

Mr. BRISTOL: This is the original, your Honor, that is in that book over yonder. I offer that as Receiver's Exhibit 5.

Thereupon said letter was by the Reporter marked RECEIVER'S EXHIBIT 5, and is as follows:

"B. D. Sigler, Assessor,
Multnomah County,
Portland, Oregon. July 13th, 1908.

"Mr. R. S. Howard, Receiver,

Title Guarantee & Trust Co.,
City.

"Dear Sir:

"I am unable to find any law wherein the personal property of the Title Guarantee & Trust Company, in your hands as Receiver, March 1st, 1908, is exempt, since the law reads: 'All real property within this state, and personal property situated or owned within this state, except such as may be specifically exempt by law, shall be subject to assessment and taxation in equal and ratable proportion.'

"Since there is no provision exempting property in the hands of a receiver or any court, there can be no question about the property mentioned being subject to taxation, and I herewith enclose you blank which please fill out and return to me at your earliest convenience.

"Yours very truly, B. D. Sigler, Assessor."

Q. Did you reply to that letter?

A. I did, on the same date, July 13th, 1908

Mr. BRISTOL: I offer that in evidence as Receiver's Exhibit 6.

Thereupon said paper was by the Reporter marked RECEIVER'S EXHIBIT 6, and was read as follows:

"July 13, 1908.

"Mr. B. D. Sigler, Assessor,
City Hall, City.

"Referring to your letter July 13th, the matter therein referred to will be taken up with my attorneys and you advised in due course. It may be some days before I can reach this as Mr. W. C. Bristol, one of

my attorneys, is out of the city and will not return for a week or so. I shall then be pleased to take up the matter, and report as above outlined at an early moment.

"Yours truly,

Receiver."

Q. I show you a paper and ask you if that is the kind of a statement you have referred to as having received in its present condition except for the holes in it, which I understand are caused by your files?

A. Yes, that is the form.

Q. There is not anything on it. It was in the exact condition as it is now when it was left with you?

A. Yes, with the exception of the perforations here for my files.

Mr. BRISTOL: I offer that in evidence as Receiver's Exhibit 7.

The COURT: Well, did this come to you as a notification that you had been assessed?

Mr. BRISTOL: No, your Honor. It just came in that particular condition as it is there, and is the invitation that Mr. Funk spoke of for the person in possession of the property to make a statement of it.

Thereupon said paper was by the Reporter marked RECEIVER'S EXHIBIT 7.

The COURT: What time was that sent to you?

A. I can't recall the exact time.

The COURT: What year?

WITNESS: Is that followed there with one of those letters?

Mr. BRISTOL: Yes; it is right in connection with this (passing letter to the witness).

WITNESS: It must have been March 26th, 1909. Here is my office stamp showing the receipt of it. It was soon after the first of March, I was going to say.

Q. Now I show you a letter of March 24th, 1909, which seems to be couched in practically the same language as the previous letters of 1908 and addressed to Title Guarantee & Trust Co. Do you recognize that letter?

A. I do. It is from my files. Yes, I received this.

Q. And what did you do in regard to that,—take the same procedure or some other?

A. I took it up—all of these matters were taken up with my counsel immediately.

Mr. BRISTOL: I offer this in evidence.

Thereupon said paper was by the Reporter marked RECEIVER'S EXHIBIT 8, and was read, as follows:

“B. D. Sigler, Assessor,

Multnomah County,

Portland, Oregon.

March 24th, 1909.

“Title Guarantee & Trust Co.,

2nd & Washington Sts.,

City.

“Gentlemen:

“Please furnish this office with a statement showing the amount of Capital Stock, Surplus and Undivided Profits of the Title Guarantee & Trust Company at the close of business February 28th, 1909, together with a list of the Stockholders of the Bank.

“In case you wish the assessment made directly to the Bank, please make a written request to that effect, as follows:

“We would ask that you make the assessment directly to Title Guarantee & Trust Company for and on behalf of said Stockholders, that the Bank may directly pay the taxes; this Bank agreeing to hold you harmless for any irregularities in the form of said assessment.

“(Signed) President or Cashier.”

“Yours very truly, B. D. Sigler, Assessor. M.”

Q. Now in that connection for 1909 I show you a paper addressed to Title Guar. & Tr. Co., 2nd & Wash. St.”, dated October 16, and bearing stamp of October 26, and ask you if you ever had to do with that and what it is.

A. Yes. I received this and with such notice as I heretofore mentioned as having a recollection of having received.

Q. Now that is for the 1909 tax, isn't it, Mr. Howard?

A. Yes, sir.

Q. Notifies you of the assessment for 1909?

A. October, 1909; yes.

Q. Now does it notify you, Mr. Howard, or does it notify the Title Company?

A. It notifies the corporation.

Q. And is R. S. Howard, Junior's name on there at all?

A. No, sir.

Q. I call your attention to the roll in front of you for that same year, page 6708, roll 1909, and show you line 46; in that connection I call your attention to the words “Title Guarantee & Trust Co.”, and then

following the same "R. S. Howard, Jr., Receiver", merchandise and stock \$40,000 carried out; office furniture and fixtures, or household furniture and fixtures, \$1500; total amount, \$41,500; total tax \$747. Did you receive any notice to R. S. Howard, Junior, Receiver, other than this paper which you have identified?

A. I did not.

Mr. BRISTOL: I offer that in evidence. That is offered, your Honor, for the purpose of illustrating the method and manner they had, and showing that the county treated the Title Guarantee & Trust Company a physical entity, regardless of the receivership, and attempted to assess it for merchandise and for furniture.

Thereupon said paper was by the Reporter marked RECEIVER'S EXHIBIT 9, and is as follows:

"Office of Assessor
Multnomah County, Oregon.

B. D. Sigler, Assessor

L. H. Maxwell, Chief Deputy
Portland, Oct. 16, 1909.

"Title Guar. & Tr. Co.
2nd & Wash., St.,

"Dear Sir:

"I have made an arbitrary assessment of your personal property which will appear on the Assessment Roll as follows:

Merchandise\$40,000.

Machinery\$——

Money, Notes and Accounts.....\$——

| | |
|--------------------------------------|----------|
| Agricultural Tools, Wagons, Etc..... | \$——— |
| Furniture | \$ 1,500 |
| Horses | \$——— |
| Cattle | \$——— |
| Exemption | \$——— |

"If you are not satisfied with the assessment, as above, you will please appear before the County Board of Equalization, which will be in session during the week, commencing with the Third Monday in October.

"Yours truly, B. D. Sigler, Assessor."

Q. Now what is the fact, Mr. Howard, with reference to there being personal property of the Title Guarantee & Trust Company of any kind or nature existent anywhere outside of your possession?

A. Well, there is none.

Q. Has there ever been any since the 21st of January, 1908?

A. Not to my knowledge.

Q. Did you ever receive other than the papers that I have shown to you, any notices about any of this tax that you owed? Were any claims made for penalty and interest accumulating against this receivership in favor of Multnomah County, the City of Portland or the State, by virtue of these pretended assessments that appear here?

A. There was no talk about penalties.

Q. And outside of the previous testimony, so far as it applied to those statements shown to the Title Guarantee & Trust Company, there was no demand, was there, or was there not, ever made upon you for

payment of penalty and interest as receiver?

A. None excepting these mailed notices to the Title Guarantee & Trust Company.

Q. Was ever any claim filed with you by Multnomah County, or anyone for it, in any particular year, for allowance of a claim for taxes of any kind or nature?

A. No, none.

Q. Then outside of, as I understand it, the demand of Sheriff Stevens sometime along in January, 1912, always conceding to counsel the acts as stated in the official record, there was no notice given to you or claim made by anybody, as receiver, upon which the present intervening petitions are based, was there?

A. No.

Q. The first notice you had of it was the filing of the petition by Emmons & Webster?

A. My first notice.

Q. And when that was served on you what did you do?

A. I took it up with my counsel.

Q. Are you conscious of having done, and if you are I want you to state it fully and frankly, any act which led these officers of Multnomah County to believe—I mean now as a fact, you understand, not your opinion—that they could look to you as receiver of this property for taxes?

A. Why, absolutely not.

Q. State whether or not on the contrary, the fact is that at all times and under all circumstances when this tax matter came up you took a certain fixed, defi-

nite position upon it and so notified them?

A. I have, all along.

Q. And what has that position been? Is it illustrated in this correspondence and notice?

A. Absolutely; yes.

Q. And in your answer?

A. Absolutely.

Mr. BRISTOL: I didn't understand counsel for the petitioners to claim that there are any other assessments other than what has been produced here in evidence.

Mr. EVANS: None that I know of.

Mr. BRISTOL: None that you know of. I think that is all.

Re-direct Examination.

By Mr. EMMONS:

Q. This position that you say you took was that the personal property on which this assessment was made was in the custody of the court and therefore not assessable; is that the position?

A. Yes; under the advice of counsel I took that position.

Q. Yes. It was not because it was assessed in the name of the wrong party but because it was in the custody of the court that you claimed you were not liable?

A. Being in the custody of the court.

Q. You knew, did you, what property the Assessor was attempting to assess, and on what property the Sheriff was attempting to collect the taxes?

A. No, I didn't know the detail of it, Mr. Emmons. I assumed he was assessing notes and accounts, just in a general way.

Q. Personal property in your hands as receiver?

A. Personal property in my hands.

Q. Of the Title Guarantee & Trust Company. And did you ever request this assessment on this property after being notified, as these notices show, to be made in your name as receiver and not in the name of the Title Guarantee & Trust Company?

A. Quite to the contrary, I maintained that I could not meet an assessment.

Mr. BRISTOL: Of course, your Honor, I don't know what counsel means. I don't want to be objecting, but I want this to clearly and distinctly appear on the record. This receiver is merely the instrument of this Court, and this Court is not bound, even if Mr. Howard laid down and did nothing, and therefore it is not competent for Mr. Emmons to pursue, if that is his purpose and he intends to claim for that that because the receiver did not make this or that particular objection that he is now estopped, because nothing estops a federal court; absolutely nothing; and I want to have that point clearly on the record, because it has a tendency to amplify the legal positions that we will take, and I want Mr. Emmons to be fairly informed of our position, namely, that we care not whether Mr. Howard did or did not tell them how they could assess it or get a better assessment, that we shall claim for all intendments whatever there may be against the legality of this assessment, against its validity in

every way, and uphold the right of the federal court to give its permission first as to whether the property should be assessed at all or not.

Mr. EMMONS: I just simply want to get what the facts are before the Court, is all.

The COURT: Well, ask your question.

Q. Then as I understand it, you never requested it to be made anything different, to any different person or otherwise than it was made?

A. I did not.

Q. Were you in any way deceived as to what property was intended to be assessed or against what property the tax was levied by these notices?

A. Deceived? No. I just assumed the assessment was against personal holdings and made in a general way.

Q. Against personal property in your hands as receiver?

A. Yes. I didn't go into the details of it and don't know the details up to this minute what was assessed, beyond this record.

Q. Your objection was a legal objection?

A. A legal objection, under the advice of my counsel.

Q. As to the right to tax personal property in your hands as receiver?

A. Yes, sir.

Q. Mr. Stevens, the Sheriff, had considerable talk with you, did he not, while he was Sheriff, about this collection of this tax?

A. My recollection is Mr. Stevens met me on the

street, if I recall right; he may have come in the banking house; I am not sure as to that. My recollection is that he spoke about it this one time.

Q. And he tried to collect the tax, did he?

A. He called my attention to it.

Q. Did he ask you to pay it?

A. He asked me if I was going to pay it.

Q. Was that before this proceeding was brought?

A. It was.

Q. And you took it up with your attorney at that time, and as a result of that this letter was written to the Sheriff, was it not, on January 26th, 1912? As the letter reads, that was the result of the demand being made upon you by the Sheriff to pay these taxes now attempted to be collected?

A. It was the result of that interview.

Mr. EMMONS: I think that is all.

Mr. EVANS: That is all.

Mr. BRISTOL: It will be conceded, will it not, Mr. Evans and Mr. Emmons, that the only assessment made to the receiver of the Title Guarantee & Trust Company, your nominee, was made this year?

Mr. EVANS: Well, there are two of them there that speak for themselves.

Mr. BRISTOL: No; to the contrary. I think it is very plain. Now we will have to demand, then, all the tax rolls, if that is the case, because we will argue that. We will leave that to the Court as to whether that is an assessment to the receiver.

Mr. EVANS: My contention is, very frankly, it would not make any difference, so far as the legality

of the assessment is concerned.

Mr. BRISTOL: Then if it makes no difference, you will expedite the case by having it conceded that the first assessment you made in this manner, R. S. Howard, Receiver, T. G. & T. Co., or Title Guarantee & Trust Company—I am not quibbling about the words, but the first assessment whereby in the name of the taxpayer appearing in any of your rolls is for 1913 for Multnomah County.

Mr. EVANS: No, I would not say that. The rolls are here involving this, and whatever they show that is what I will concede, and I would not have a right to concede any more than they do show.

The COURT: 1912 and 1913 are not involved in this proceeding, are they?

Mr. EVANS: They are not involved.

Mr. BRISTOL: That may be true, but the question is this: Can Multnomah County arise single-handed, as they want to, and do as it likes with reference to its assessment roll, where with reference to this same property it has done something else? Isn't that material evidence? Most assuredly it puts an interpretation upon their acts. And I say, without peradventure of a doubt and without fear of contradiction, that the first time R. S. Howard as receiver, as your officer, was assessed by Multnomah County was for the year 1913.

Mr. EVANS: That might be so, but I don't know and I don't think it makes a particle of difference.

Mr. BRISTOL: You might not think so.

Mr. EVANS: The County can't be estopped by the

action of its officers, or the state or city, any more than the Court.

Mr. BRISTOL: And likewise this Court can't be estopped by the action of its receiver.

The COURT: I think those are facts that are immaterial here. What we are getting at now is as to the manner of the alleged assessment here.

Mr. BRISTOL: Your Honor don't get my point. In these petitions the question is simply raised as to whether or not this receiver was ever assessed. Mr. Evans says that in his opinion of the law it makes no difference whether the receiver was assessed, or who was assessed; that the Assessor endeavored to reach some property. Now if it was in the possession of the court, or receiver, or whoever it was in possession of, there is an assessment and that is the one we mean. It is certainly pertinent to show with reference to that same County's acts and with reference to the same property, that while this controversy is still pending and prior to the hearing upon the petitions prior to the consideration of the matter before the Court the County takes more acts by its officers thereunto authorized, showing when they first did assess this matter in accordance with the objections of this receiver. Now Mr. Emmon's cross-examination, over my objection, was right along that very line: "Did you make any other objection than this? Did you ever tell the Assessor to do thus and so?" Now I want to show by these records; I have looked at them and know but I don't want them to take my statement for it, if they want to object to it, that the first time they

ever assessed R. S. Howard, Receiver, was upon roll page 6119, line 12, for 1913. That is the present roll.

The COURT: You don't want to concede that?

Mr. EVANS: Well, I don't know. If he says that is so I will admit it as true; but, according to Mr. Bristol's own contention, it could not make a bit of difference how he assessed it. He says the officer of this court can't be assessed for taxes.

The COURT: I suppose we concede that to be true.

Mr. BRISTOL: That is all there is to it.

Mr. EVANS: If he says that is so, that is all right.

Mr. BRISTOL: That is all there is to it, because I fear Mr. Emmon's theory is this: That it devolved upon the receiver, and his cross-examination has tended that way, if he had any objections to make, to have said so to the Assessor, "You are doing this wrong. This is the right way to do it." Else his mouth is closed to make any complaint about any irregularity, illegality, or anything about it. I want to cover that point.

Mr. EVANS: That was brought out by your line of cross-examination yourself. You were putting it along with your questions indicating here that he was never assessed as receiver for the Title Guarantee & Trust Company.

Mr. BRISTOL: Exactly.

Mr. EVANS: And every one of your questions indicated that you were making a point out of that, that he was not assessed as receiver. Now Mr. Emmons was emphasizing the fact that he was invited in some of his letters to say how he would like to be assessed,

and he didn't say anything about it.

Mr. BRISTOL: Then I want the concession, which I understand, on the roll for 1913 the receivership appears as actually assessed for the first time.

Mr. EVANS: No, I won't say that, because there are two others here. But I will leave that to your statement, as you say it does appear on the 1913 roll.

Mr. BRISTOL: Yes.

The COURT: Is that all with this witness?

Mr. EVANS: You did get notice of arbitrary assessments like this for other years, did you not?

Mr. EMMONS: He testified to that.

Mr. EVANS: Oh, he did.

Mr. BRISTOL: Let him answer it again, to be sure. I want you to have the benefit of all there is.

A. I can't recall I received them every year, but I do recall other instances than this.

Mr. EVANS: The reason I am asking is in the year previous to that, referring to Receiver's Exhibit 3 there, and correspondence, and to Receiver's Exhibit 5, the correspondence carried on about the assessment is addressed to you as receiver, I believe?

A. Yes; this was right after my appointment as receiver, just a month or two afterwards.

Mr. EVANS: And in all probability, then, the notices to you would have come as receiver, but you only bring the one here that is addressed to the Title Guarantee & Trust Company?

A. I don't think, Mr. Evans, in those earlier years they were sending these out so regularly as they did later. That is my recollection, although I have no

vivid recollection on it.

Mr. BRISTOL: The trouble is, Mr. Evans, that when they did write to him as receiver in 1908 and 1909 they sent the arbitrary assessment notice to the Title Guarantee & Trust Company and in its name.

Mr. EVANS: Well, the 1908 one is not here. That is the thing I am trying to get at.

Mr. BRISTOL: Well, I don't think we had it. That is all, except I would like to put the general question, if you don't mind: Is there any other matter or thing regarding this you have not been interrogated about, concerning which it is your duty to advise the Court as its officer?

A. There is not.

(Witness excused.)

Mr. EVANS: That is all, your Honor.

The COURT: Is that all, Mr. BRISTOL?

Mr. BRISTOL: Yes, your Honor, because our evidence practically in a sense is what Mr. Howard has testified to, and in order to keep the record clear I would move your Honor now for the dismissal of both of the petitions of the intervenor upon the grounds that are set forth in the receiver's answer, for insufficiency; and of course that raises these questions that come up under those exceptions and the demurrer, and I have no desire to forestall counsel in the opening and closing of the case. I didn't make that motion to dismiss merely for the purpose of getting a chance to argue both at the front end and at the rear end of this matter, and if they wish to argue the

whole matter now I am willing to concede to them their opening, and then I will reply to anything fresh they might make, or if it is agreeable, I will state my position in it; whichever way you want it?

Mr. EVANS: I don't think it makes any difference. I don't think the Court will shut any of us off from saying anything we desire to.

Thereupon the matter was argued to the Court pro and con.

[Receiver's Exhibit 1.]

In re Title Guarantee & Trust Co.—State of Oregon Claims; George A. Steel, Treasurer.

January 26th, 1912.

Mr. Robert L. Stevens,
Sheriff of Multnomah County,
Portland, Oregon.

My dear Mr. Stevens:—

Noting considerable agitation relative to the matter of alleged delinquent personal property assessments, I take occasion to inform you of a condition which you may not know of and yet which may be pressed upon you:—

All of the property, real, personal and mixed, of The Title Guarantee & Trust Company passed into the hands of the federal court for the District of Oregon on the 6th day of November, 1907. Since which time, and now, it is being administered by that court through its receivers and by the federal judges in Tacoma and elsewhere where its property is situated, solely and only for the purpose of gathering in the

assets and distributing them among the various depositors and creditors. All of the property has been and is now in the custody of the law under the administration of the federal court.

It may have happened that officers of Multnomah County, not knowing this, have undertaken to list an assessment of personal property against The Title Guarantee & Trust Company or against its receiver, or in some manner or way have undertaken to note upon the personal property records of Multnomah County a listed assessment against some of the assets of this concern or its collateral companies.

With a view to obviating any difficulties that might arise I wish to say to you that under this situation the attitude that has governed the receivership has been one that required it to act at all times pursuant to the orders of the federal court, and as no method or step was taken in that court in reference to these matters, naturally it would not permit its jurisdiction to be interfered with.

I shall be obliged therefore if you will consider these matters and let me know if under these circumstances you notwithstanding desire to take some action so that I may relieve you of trouble and difficulty and conflict of authority between the State officials and the federal court. I am convinced, however, that when you consider the matter you will see that any such assessment that may have been made would have been necessarily erroneous.

If there is any further information or assistance that I can give you kindly let me know.

With sincere regards, I have the honor to be

Very respectfully yours,

Receiver's Exhibit 1. Filed Nov. 26, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 1 day of July, 1914,
there was duly filed in said Court, a Petition for
Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States

in and for the District of Oregon

Ninth Judicial Circuit

In Equity.

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,

Defendants.

MULTNOMAH COUNTY,

Intervenor,

vs.

R. S. HOWARD, JR., Receiver of The Title Guar-
antee & Trust Company,

Respondent.

In the Matter of the Insolvency and Receivership of
The Title Guarantee & Trust Company.

No. 3209.

In the Matter of the Intervention of Multnomah

County for Personal Property Taxes.

Petition of R. S. Howard, Jr, Receiver of The Title Guarantee & Trust Company, for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Filed July 1st, 1914.

To the Honorable, The Judges of the District Court
of the United States in and for the District of
Oregon, Ninth Judicial Circuit, in Equity Sit-
ting:—

The petition of R. S. Howard, Jr., receiver in the above entitled matter, doth respectfully show, allege and represent:—

That this is an intervention of Multnomah County as intervenor in the main cause wherein M. Coy is complainant and The Title Guarantee & Trust Company and others are defendants in the matter of the insolvency and receivership of The Title Guarantee & Trust Company, whereby the intervenor, Multnomah County, seeks satisfaction for alleged personal property taxes conceived to have been wrongfully decreed to it in proceedings in said intervention by the order and decree hereinafter referred to.

The above named R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, as petitioner and respondent in the above entitled intervention filed and presented in the main cause of N. Coy vs. The Title Guarantee & Trust Company, No. 3209 in said Court as above entitled, conceiving himself aggrieved by the decree and order made, rendered and entered on the 23rd day of the month of April in the year 1914,

as more fully and at large appears in Equity Journal number 2 at page 422 thereof in the above entitled intervention, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, upon the grounds and reasons specified in the assignment of errors filed herewith.

The said R. S. Howard, Jr., receiver of the said The Title Guarantee & Trust Company, petitioning respondent, doth pray that this, his appeal, may be allowed and that a transcript of the acts, things and proceedings had, taken and done and the papers upon which the said decree and said acts and proceedings had, taken and done are based and the said order of the 23rd of April, 1914, rendered and made, may be duly authenticated and sent up to the United States Circuit Court of Appeals for the Ninth Circuit conformable to the statute in such cases made and provided.

And the said R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, doth now submit this his prayer for appeal to the Honorable Charles E. Wolverton, one of the judges of said court appointing him receiver herein for that as such receiver he is amenable to the orders and directions of said court, and doth submit the causes and reasons to said judge so appointing him in order that full consideration of this petition and prayer for appeal may be considered and if deemed proper allowed. And your petitioner will ever pray, etc.

R. S. HOWARD, Jr.,
Receiver of The Title

Guarantee & Trust Company,
Petitioner in said Intervention.

W. C. BRISTOL,

Solicitor for R. S. Howard, Jr.,
Receiver of The Title Guarante-
ee & Trust Company, Petition-
er in said Intervention.

[Endorsed]: Petition for Appeal. Filed July 1,
1914.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 1 day of July, 1914,
there was duly filed in said Court, Order Allow-
ing Appeal, in words and figures as follows, to
wit:

[Order Allowing Appeal.]

*In the District Court of the United States
in and for the District of Oregon
Ninth Judicial Circuit
In Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,
Defendants.

MULTNOMAH COUNTY,

Intervenor,

vs.

R. S. HOWARD, JR., receiver of The Title Guarantee & Trust Company,

Respondent.

In the Matter of the Insolvency and Receivership of The Title Guarantee & Trust Company.

No. 3209.

In the Matter of the Intervention of Multnomah County for Personal Property Taxes.

Order Allowing Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

This day came R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, petitioning respondent, and presented his petition for an appeal, together with the assignment of errors accompanying the same, to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled matter, and upon consideration thereof it is

ORDERED that the said prayer of appeal be received and allowed and that said appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit upon the filing of a bond in the sum of two hundred and fifty dollars (\$250.00) with American Surety Company of New York as surety, conditioned to make said appeal good or pay the costs thereof;

ORDERER FURTHER that this being an intervention it shall be sufficient to take up such part of the records only as apply directly to the petitioning intervenor, Multnomah County, and only such parts of the main cause as may be pertinent thereto and

necessary to an understanding of the issues.

(Sgd) CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Order Allowing Appeal. Filed July 1, 1914.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 1 day of July, 1914,
there was duly filed in said Court, a Notice of
Appeal, in words and figures as follows, to wit:

[Notice of Appeal.]

*In the District Court of the United States
in and for the District of Oregon
Ninth Judicial Circuit
In Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,
Defendants.

MULTNOMAH COUNTY,

Intervenor.

vs.

R. S. HOWARD, JR., receiver of The Title Guar-
antee & Trust Company,

Respondent.

In the Matter of the Insolvency and Receivership

of The Title Guarantee & Trust Company.

No. 3209.

IN THE MATTER OF THE INTERVENTION
OF MULTNOMAH COUNTY FOR PERSONAL
PROPERTY TAXES.

Notice of Appeal.

To MULTNOMAH COUNTY, intervening petitioner, and to MESSRS. EMMONS & WEBSTER, its attorneys; and to

Mr. WALTER H. EVANS, its attorney; and to

WALTER H. EVANS, District Attorney for the Fourth Judicial district of the State of Oregon:—

YOU AND EACH AND ALL AND EVERY ONE OF YOU ARE HEREBY NOTIFIED that R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, in the above entitled intervention, has filed his prayer for an appeal, and this is your notice thereof that his prayer has been allowed and that he has appealed and does hereby notify you of his appeal from that certain order and decree entered in this proceeding in intervention on the 23rd day of April, 1914, as set forth at large in volume 2 of the equity journals of said court at page 422 thereof and from the whole and every part of said decree and all of it and copies of his petition and prayer for said appeal, of his bond therefor, of the order allowing the same and of his assignment of errors upon which the same is based are herewith served upon you.

W. C. BRISTOL,

Solicitor for R. S. Howard, Jr.,

Receiver of The Title Guar-
antee & Trust Company,
Petitioner in said Intervention.

District of Oregon,

County of Multnomah.—ss.

Due service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this 30th day of June, 1914, by receiving a copy thereof, duly certified to as such by W. C. Bristol, Attorney for Receiver.

EMMONS & WEBSTER,
Attorneys for Multnomah County.
WALTER H. EVANS,
District Attorney of Multnomah Co.,
Oregon.

[Endorsed]: Notice of Appeal. Filed July 1, 1914.
A. M. CANNON,
Clerk.

And afterwards, to wit, on the 1 day of July, 1914,
there was duly filed in said Court, Assignments
of Error, in words and figures as follows, to wit:

[Assignments of Error.]

*In the District Court of the United States
in and for the District of Oregon
Ninth Judicial Circuit
In Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-

PANY, a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,

Defendants.

MULTNOMAH COUNTY,

Intervenor,

vs.

R. S. HOWARD, JR., receiver of The Title Guarantee
& Trust Company,

Respondent.

In the Matter of the Insolvency and Receivership
of The Title Guarantee & Trust Company.

No. 3209.

In the Matter of the Intervention of Multnomah
County for Personal Property Taxes.

Assignments of Errors by Respondents, R. S. How-
ard, Jr., Receiver, upon his Appeal in said Interven-
tion.

To the Honorable Judges of the District Court of the
United States in and for the District of Oregon,
in Equity sitting:—

These are the (assignment of) errors preferred
by R. S. Howard, Jr., receiver of The Title Guarantee
& Trust Company, petitioning appellant and respond-
ent in the above entitled cause:

Now comes the petitioning respondent appellant,
R. S. Howard, Jr., receiver of The Title Guarantee &
Trust Company, and having prayed for an allowance
of an appeal from the order and decree entered in the
intervention of Multnomah County in this cause on
the 23rd day of April, 1914, against him requiring the

payment of certain taxes, penalties and interest therein in said decree referred to, sets forth the grounds and reasons for said appeal and assigns for errors in said decree and proceedings of Court thereabout the following:—

FIRST.

That the said District Court of the United States in and for the District of Oregon, Judge Charles E. Wolverton sitting, erred in determining and deciding that the laws of the State of Oregon provide for the assessment of personal property taxes against a receivership or property surrendered to the Court in the hands of its receiver.

SECOND.

That the said District Court erred in determining and deciding that The Title Guarantee & Trust Company still retained a corporate entity for the purpose of winding up its business, and in that connection in determining and deciding that it was corporate business that the receiver was transacting herein at the time and during the periods the alleged personal property taxes were said to have been assessed.

THIRD.

That the said District Court erred in determining and deciding that all property according to the revenue and taxation laws of the State of Oregon is by those laws assessable, in so far as the Court applied such a determination and decision to personal property in the hands of said receiver.

FOURTH.

That the said District Court erred in determining

and deciding that The Title Guarantee & Trust Company, for the purposes of applying the law in this case, was a going concern, submitting its property in process of dissolution to the action of the taxing authority, whereas in truth and in fact all of the property of The Title Guarantee & Trust Company was surrendered and the officers thereof had released their control thereto and said matters were of record in said Court in the main cause at the time of the filing of the petitions in intervention and before the assessment of the taxes the basis of the petitions in intervention.

FIFTH.

That the said District Court erred in determining and deciding that The Title Guarantee & Trust Company, through itself and receiver, was in possession of property subject to taxation as a going concern, for that the bill of complaint upon which said Court acquired original jurisdiction in said main cause submitted said corporation to the jurisdiction for the purposes and upon the facts as in said bill set forth, for more particular identification of which it is in connection with this assignment of errors set forth fully and at large that the point of law based on this assignment of errors may appear clearly, to-wit:—

SIXTH.

That the said District Court erred in determining and deciding that The Title Guarantee & Trust Company, through itself and receiver, was in possession of property subject to taxation as a going concern, for that the appearance and consent filed by the defend-

ants in said main cause submitted said corporation to the jurisdiction of the court for the purposes and upon the facts as in said appearance and consent set forth, for more particular identification of which it is in connection with this assignment of errors set forth fully and at large that the point of law based on this assignment of errors may appear clearly, to-wit:—
SEVENTH.

That said District Court erred in determining and deciding that the personal property taxes claimed for in the petition in intervention were assessed against property of a going concern in the hands of a receivership and as if previous to the time when the receivership had occurred, whereas in truth and in fact this was a proceeding winding up and liquidating all of the property of the corporation, all of the officers of whom had surrendered its corporate entity to the Court, together with all of its property, including all of its personal property then being distributed to claimants and distributees whose claims had been duly proved and allowed.

EIGHTH.

That the said District Court erred in determining and deciding that the personal property assessed was the personal property of the corporation or the receiver because the same was a trust fund for the creditors and claimants of the corporation who as claimants and distributees thereof with proved and allowed claims were entitled to the same.

NINTH.

That the said District Court erred in determining

and deciding said alleged personal property tax was recoverable for the reason that no business was ever done by the corporation, The Title Guarantee & Trust Company, of any kind or nature whatsoever from and after the 2nd day of November, 1907, long after the alleged assessment of taxes on personalty described in the petitions, so that there was no personal property of the corporation to be assessed in the same manner as that of a natural person, nor was there any personal property in the hands of the receiver assessed during said period, there being no such class of property defined in the laws of Oregon for assessment and taxation in that state.

TENTH.

That the said District Court erred in determining and deciding "but where property remains within the jurisdiction and within the hands of the person taxed there is no impediment to the enforcement of the payment of the personalty tax assessed against him," and in applying it to this case because there was no property in the hands of the person taxed belonging to such person as his or its personal property at the time of the alleged tax and an assessment claimed to have been made either to the receiver or to the corporation under the facts of this case did not support the Court's opinion in that regard.

ELEVENTH.

That the said District Court erred in determining and deciding,—especially when it found that the taxing officers of the petitioner were early advised that the receiver would resist the payment of taxes as-

sessed against personal property within his hands before any of the taxes in question were levied and also found that the taxes which are sought to have paid were assessed a part of the time in the name of the defunct company alone and a part of the time in the name of the receiver, that the same could be claimed by Multnomah County out of personalty distributed to the various creditors and claimants during the process of administration occurring while said property was said so to have been assessed.

TWELFTH.

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

“*FOURTH.* That all of the so-called personal property mentioned in the intervening petitions, if assessed to The Title Guarantee & Trust Company, has been and was doubly assessed, for that all of such property was the property of the creditors and claimants who presented their claims to the receiver and had said claims approved and allowed during the times and for amounts which represented the actual conversion of the personal property of The Title Guarantee & Trust Company into liquidated assets which were in turn distributed to said creditors and claimants who in turn paid personal property taxes assessed to each of them individually, and hence it is not competent for Multnomah County to claim that during the same time and in respect to the same property other personal property taxes could be

assessed against and collected from The Title Guarantee & Trust Company or its estate."

THIRTEENTH.

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

"*FIFTH.* The affairs of The Title Guarantee & Trust Company are not in the nature of an operated concern kept alive by a receivership and administered by the court, but upon the 2nd day of November, 1907, it became insolvent, admitted its insolvency, its officers came into court and surrendered the company to the court, the court took possession of it, appointed its receiver and there has been no corporate management subsequent to such control, except only for the purpose of a more full and better administration of this court."

FOURTEENTH.

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

"But in this case we are not presented with a situation upon either petition of a tax actually attaching to property previous to any possession by the court. The tax for 1907 could not be leviable as a matter of law until after the 1st of January, 1908, and the Board of Equalization did not sit and determine the tax roll assessment until October, 1907, and before the amount of the tax could be computed for the year 1908 all of the

property of The Title Guarantee & Trust Company had passed into possession of the court, hence we have not a case presented here which is likened to the cases that ordinarily arise in the matter of imposition of taxes upon going receiver-ships."

FIFTEENTH.

That the said District Court erred in disregarding and in overlooking and refusing to decide, in conformity with the law of the State of Oregon, that a court of equity is without power to render a money judgment for the amount of personal property taxes claimed in the intervening petitions.

SIXTEENTH.

That the said District Court erred in disregarding the point submitted to it below, viz:—

"The receiver has all along contended that the petitions in this case were not sufficient to justify a recovery. It nowhere appears that the County of Multnomah exhausted its remedies as against the real estate in the name of or claimed to be held by The Title Guarantee & Trust Company and it is only against real estate or against the personal property itself *in situ* that the delinquency can be enforced by a warrant."

SEVENTEENTH.

That the opinion and decision of the District Court is directly against and not in conformity with the decisions of the Supreme Court of the United States in the case of *United States v. Whitridge*, receiver, and *United States v. A. H. Jolin, et al.*, receivers, wherein,

on writ of certiorari granted March 10, 1913, 227 U. S. 680, said Supreme Court of the United States affirmed the decision of the Pennsylvania Steel Co. v. New York City in 190 Fed. 777, on or about the 11th of November, 1913, prior to the trial of this intervention, although said opinion was then submitted to said court on the trial below.

EIGHTEENTH.

That the said District Court erred in disregarding the point submitted to it below, viz:—

“Fifth. Even bankruptcy courts and the statutes relative to administration of estates provide only for taxes *in esse* at the time of the commission of the act of bankruptcy or the death of the testator and taxes afterwards upon personalty are paid not by the bankruptcy estate or the estate of the decedent, but by those into whose hands the property is distributed.”

NINETEENTH.

That the said District Court erred in disregarding the testimony and evidence presented upon the hearing as given by the witness Chief of Field Work in the Assessor's office as follows, to-wit:—

“Q. Did you find out, and refresh your memory about R. S. Howard, Jr., receiver, business?

A. No, I didn't look any further in regard to it, Mr. Bristol.

Q. I will call your attention to intervenor's exhibit 2 and ask you if I understand you correctly that this red shows that the same sort of an arbitrary assessment would be made to The Title Company for

1909?

A. Exactly.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. It would be absolutely the same. The red is put on there for the benefit of the Assessor in making comparisons each year.

Q. I am particularly anxious to know whether the name of the receiver would be upon that assessment or that statement at all?

A. Well, that I could not tell you.

Q. Well, it is not on that one, is it?

A. No. That I could not tell you. But the amounts here are taken, these amounts here are taken from the previous.

Q. Yes, I understand that; the previous roll?

A. Yes. But in regard to the name, why, I could not tell you.

Q. Well now, this roll says, 'Title Guarantee & Trust Co.', don't it?

A. Yes.

Q. 'Character of business, banking'?

A. That is the item, the statement there, although the roll might include even more than that.

Q. All right; let's look at it. 6782, line 45, would represent the roll for 1910, wouldn't it?

A. Yes, sir.

Q. That is on Intervenor's Exhibit 2 and is the entry that shows that this statement was entered?

A. Yes, sir, that is it exactly.

Q. I notice on here in blue pencil, 'See Maxwell

before entering.' What does that mean?

A. Well, evidently Mr. Maxwell asked something in regard to it. Maybe he wrote it himself. I don't know whether he did or not.

Q. Why was it that Maxwell was always the fellow that was particularly concerned here about this Title Guarantee & Trust Company tax apparently?

A. Well, that I don't know, otherwise than that he was chief deputy in the office. Otherwise I could not tell you.

Q. Now, I show you the 1909 roll at the point and place where line 46 appears, and ask you by what authority anybody would have to enter the name of the Receiver, in view of the fact that you told us this morning on your direct testimony that these entries here were made up from statements previously prepared and that this statement, Intervenor's Exhibit 2, which you say is a proper one, does not show the name R. S. Howard, Jr., Receiver?

A. Well, that would not be any reason why that they could not be added to it, because it is not a tax roll, Mr. Bristol.

Q. Well, but I am getting at the fact that you stated—

A. (Interrupting) It could not be—

Q. (Interrupting) Now, wait a minute. Did I understand you correctly that the foundation for the roll itself is either a previous blank or a previous statement either actually made by the owner or arbitrarily made by the Assessor?

A. Yes, sir.

Q. Is that true?

A. That is true.

Q. Now then, it is also true, isn't it, that Intervenor's Exhibit 2, you told us was the same by reason of these red letters that you identify it by, was the same for 1909 as it was for 1910?

A. Yes, sir. These items—

Q. (Interrupting) Now then, these—

Mr. EVANS: (Interrupting) Wait until he gets his answer finished.

Mr. BRISTOL: All right. Go ahead.

WITNESS: These items are absolutely the same. (Indicating). These may not be the same, because if this had changed hands and was under a different name, why, these items would appear, as this was assessment on the particular property.

Mr. EVANS: 'This' and 'these' don't get in the record.

Q. (Mr. Bristol) So you did have some information then with regard to the future whether the institution changed hands, did you?

A. Oh, sure.

Q. Now, as a matter of fact, it had changed hands prior to 1909, hadn't it?

A. Yes; part of it was changed hands anyway, before that.

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was constantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced, the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor makes this up, now—

Q. (Interrupting) What you are referring to as 'this,' is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the

day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Howard, Jr.'s. name so long as he notifies him.

A. Yes.

Q. Have you got any proof that he ever notified him?

A. Yes.

Q. What?

A. The record shows, you know, the date of the notification, and that is the only person that he could notify.

Q. Where is the record of notification in 1909 that you notified the Receiver?

A. We haven't got it here.

Q. You haven't got it here. Did you notify the Receiver?

A. I always do.

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. Always do, because the Assessor knew—there is no doubt but what he knew The Title Guarantee & Trust Company was in the hands of a Receiver and that R. S. Howard, Jr., was the Receiver.

Q. Now, Mr. Funk, just a minute. I don't want you to make a statement that might be incorrect.

A. I don't want to, either.

Q. I know, but listen. Now let me remind you: You remember that George H. Hill was the first Receiver in this court, don't you, and that he was removed?

A. Yes, I remember he was, yes.

Q. And you remember that next to George H. Hill came Edward C. Mears, who would be the receiver in the year that this assessment was made, 1909.

A. Well then, probably Mr. Mears is the man that —

Q. (Interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. Well, if Mr. Mears was the receiver at the time that this roll was turned over to the Board of Equalization, I haven't any explanation.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in the Board of Equalization in October of 1908, wouldn't it?

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not the 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. In other words, then, if that be the case, there is twelve months yet in our favor that I didn't know about. The roll for this year of 1913, for instance, we

went before the Board as taxpayers in October, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

Q. Is that right?

A. The 1st of February.

Q. The 1st of February, yes. Now then, this 1909 roll then would not be subject to collection upon it until the following 1st of February, 1910?

A. That is correct."

TWENTIETH.

That the said District Court erred in disregarding the evidence and in failing and refusing to find upon the evidence and the concession made by the intervening petitioner, Multnomah County, upon the trial, the evidence and the concession that the only time and the first time that R. S. Howard, receiver, was ever assessed was upon roll page 6119, line 12 for 1913, the present roll, pages of the record 79, 80 and 81, and the evidence does not disclose and there was not any evidence tending to show or prove that any assessment was made against property of The Title Guarantee & Trust Company or its receiver as a going concern or otherwise than as shown on said rolls in the name of The Title Guarantee & Trust Company as if it were a going concern.

TWENTY-FIRST.

That the said District Court erred in determining and deciding that Multnomah County, intervening petitioner, could recover penalties and in adjudging and

ordering any penalties to be paid upon any of the alleged personal property taxes.

TWENTY-SECOND.

That the said District Court erred in determining and deciding in favor of the intervening petitioner, Multnomah County, and against R. S. Howard, Jr., receiver, as follows, to-wit:—

“IT IS HEREBY ORDERED AND DIRECTED, that R. S. Howard, Jr., Receiver herein, pay to the TAX COLLECTOR of Multnomah County, on account of the State, County, School, and Municipal taxes assessed against the personal property of The Title Guarantee & Trust Company for the year 1908, the sum of \$1,304.00 in taxes, and the further sum of \$130.40, being 10 per cent penalty on the amount of the above taxes, and \$13.04 being interest on the above taxes at 12% from April 5, 1909 to May 5, 1909, and further that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School, and Municipal taxes assessed against the personal property of The Title Guarantee & Trust Company for the year 1909, the sum of \$747.00 in taxes, and the further sum of

\$74.70, being 10% penalty on the amount of the above taxes, and \$7.47, being interest on the above taxes at 12% from April 4, 1910, to May 4, 1910, and further, that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The

Title Guarantee and Trust Company, for the year 1910, the sum of \$913.00 in taxes, and the further sum of \$91.30, being 10 per cent penalty on the amount of the above taxes, and \$9.13, being interest on the above taxes at 12% from April 3, 1911 to May 3, 1911."

Dated at Portland, Oregon, this 23rd day of April, A. D., 1914."

TWENTY-THIRD.

That the findings and decree of said District Court are against the law and the equity of the case as presented by the intervening petitions and the answers thereto.

WHEREFORE, the said petitioning respondent, receiver, prays that the said order and decree of April 23, 1914, be reversed and that said District Court of the United States for the District of Oregon may be directed to enter an order and decree in consonance with law and equity herein giving and decreeing to this petitioner the rights he should have, and your petitioner will ever pray, etc.

R. S. HOWARD, JR.,

Receiver of The Title Guar-
antee & Trust Company,

Respondent Appellant.

W. C. BRISTOL,

Solicitor for R. S. Howard,

Jr., Receiver of The Title

Guarantee & Trust Company,

Respondent Appellant.

[Endorsed]: Assignment of Errors. Filed Jul. 1, 1914.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 1 day of July, 1914, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States
in and for the District of Oregon
Ninth Judicial Circuit
In Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY, a corporation, J. THORBURN ROSS, GEORGE H. HILL, T. T. BURKHART, JOHN E. AITCHISON and F. M. WARREN,
Defendants.

MULTNOMAH COUNTY,

Intervenor,

vs.

R. S. HOWARD, JR., receiver of The Title Guarantee & Trust Company,

Respondent.

In the Matter of the Insolvency and Receivership of The Title Guarantee & Trust Company.

No. 3209.

IN THE MATTER OF THE INTERVENTION

OF MULTNOMAH COUNTY FOR PERSONAL
PROPERTY TAXES.

KNOW ALL MEN BY THESE PRESENTS, that we, R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, petitioning respondent appellant, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Multnomah County, its successors and assigns, intervenor appellee, in the full and just sum of two hundred and fifty dollars (\$250.00), to be paid thereunto to its certain attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves as well as our heirs, successors, executors, personal representatives and assigns, jointly and severally, by these presents.

Sealed with our hands and dated this day of, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately, about the 23rd day of April, 1914, in the District Court of the United States in and for the District of Oregon in the main suit depending wherein N. Coy is complainant and The Title Guarantee & Trust Company and others respondents, by an intervention therein had whereby Multnomah County was petitioner and R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, respondent, an order and decree was rendered and entered against R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, directing certain things to be done for and on behalf of Multnomah County, petitioner; and,

WHEREAS, the said R. S. Howard, Jr., has obtained an appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy of the same in the clerk's office to reverse the aforesaid proceedings; and,

WHEREAS, a citation has issued to the appellee to be and appear at the next session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco;

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said R. S. Howard, Jr., receiver of The Title Guarantee & Trust Company, petitioning respondent, shall prosecute his appeal to effect and answer all damages and costs if he fails to make his appeal good, then the above obligation is void, else to remain in full force and effect.

R. S. HOWARD, Jr.,

Receiver for The Title Guarantee & Trust Company.

AMERICAN SURETY COMPANY
OF NEW YORK.

By W. J. LYONS,

Resident Vice President.

Attest:

[Seal]

W. A. KING,

Resident Assistant Secretary.

W. A. KING,

Agent.

Pursuant to order heretofore entered touching said

appeal, this bond now presented to me is hereby approved.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Bond on Appeal. Filed Jul. 1, 1914.
A. M. CANNON,
Clerk.

And afterwards, to wit, on the 14 day of July, 1914,
there was duly filed in said Court, an Order, in
words and figures as follows, to wit:

[Order to Reproduce Testimony.]

*In the District Court of the United States
in and for the District of Oregon
Ninth Judicial Circuit
In Equity.*

N. COY,

Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, a corporation, J. THORBURN ROSS,
GEORGE H. HILL, T. T. BURKHART,
JOHN E. AITCHISON and F. M. WARREN,
Defendants.

MULTNOMAH COUNTY,

Intervenor,

vs.

R. S. HOWARD, JR., receiver of The Title Guar-
antee & Trust Company,

Respondent.

In the Matter of the Insolvency and Receivership

of The Title Guarantee & Trust Company.

No. 3209.

IN THE MATTER OF THE INTERVENTION
OF MULTNOMAH COUNTY FOR PERSONAL
PROPERTY TAXES.

Touching the evidence to be included in the record upon the appeal herein it is by the court on consideration of the whole case and for causes and reasons sufficient thereunto.

ORDERED AND DIRECTED that all of the testimony taken by Mr. Alva W. Person on the trial of said cause shall be reproduced in the exact words of the witness and that the said record of testimony so taken and adduced shall be incorporated at large into the transcript on appeal.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Order. Filed Jul. 14, 1914.

A. M. CANNON,

Clerk.

And afterwards, to wit, on the 16 day of July, 1914, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To Multnomah County, Oregon, and Emmons & Webster, its attorneys, the State of Oregon, the City of Portland and Walter H. Evans, District

Attorney for Multnomah County, Oregon, Greeting:

WHEREAS, R. S. Howard, Jr., Receiver of Title Guarantee & Trust Co., has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

YOU ARE, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 15th day of July in the year of our Lord, one thousand, nine hundred and fourteen.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Citation on Appeal. Filed July 16, 1914.

A. M. CANNON,

Clerk.

And afterwards, to wit, on the 14 day of July, 1914, there was duly filed in said Court, an Order Certifying Up Exhibits, in words and figures as follows, to wit:

[Order Certifying Up Original Exhibits.]

*In the District Court of the United States
for the District of Oregon*

No. 3209

July 14, 1914.

N. COY,

Complainant,

v.

TITLE GUARANTEE & TRUST COMPANY, et
al.,

Defendants.

In the Matter of the Intervention of Multnomah County, et al., for payment of taxes.

It appearing to the Court that certain exhibits introduced in evidence at the trial of this cause are of such character as to require inspection by the appellate court upon the appeal herein; it is Ordered that Petitioner's original exhibits one and two and receiver's original exhibit seven be certified up with the transcript to the United States Circuit Court of Appeals, for the Ninth Circuit.

CHAS. E. WOLVERTON,

Judge.

21
No. 2455

IN
**The United States Circuit
Court of Appeals
Ninth Circuit**

N. COY
COMPLAINANT

VS.

THE
**TITLE GUARANTEE & TRUST COMPANY, a
Corporation; J. THORBURN ROSS,
GEORGE H. HILL, et al**
DEFENDANTS

MULTNOMAH COUNTY, OREGON, et al,
Intervenors, Respondents
APPELLEES

R. S. HOWARD, Jr.,
Receiver of The Title Guarantee & Trust
Company, Intervenor
APPELLANT

Brief of Appellant

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE DISTRICT OF OREGON

**WALTER H. EVANS, District Attorney for the
Fourth Judicial District,
MESSRS. EMMONS & WEBSTER, and
ROBERT F. MAGUIRE, Deputy Dist. Attorney,**
For Appellees

WILLIAM C. BRISTOL,
For Appellant

IN
**The United States Circuit
Court of Appeals**
For the Ninth Circuit

MULTNOMAH COUNTY, et al.,
Intervenors, Respondents, Appellees,

vs.

R. S. HOWARD, JR.,
Receiver of The Title Guarantee & Trust Company,
Appellant,

In the main cause of

N. COY,
Complainant,

vs.

THE TITLE GUARANTEE & TRUST
COMPANY, et al.,
Defendants.

Brief of Appellant

**R. S. HOWARD, Jr., Receiver of The Title Guar-
antee & Trust Company, on Appeal from
the Decision and Order of the District
Court of the United States in
and for District of Oregon**

*Rendered and entered the 23rd day of the month of
April, in the year 1914, in the District Court of
the United States for the District of
Oregon, in said Intervention.*

STATEMENT OF FACTS

(Rule 24, Sub. 2 (a.))

On the 6th day of November, 1907, by proceedings had in the then Circuit Court of the United States in and for the District of Oregon, now the District Court thereof, in a cause wherein N. Coy was complainant and The Title Guarantee & Trust Company and all of its officers and others defendants, the said court, on surrender by the defendants of all of the property and assets of The Title Guarantee & Trust Company, exercised its equity jurisdiction and took into its possession all of the property and assets of The Title Guarantee & Trust Company and appointed a receiver therefor pursuant to the bill and the consent and appearance of the defendants set forth in the record at pages 1 to 12.

On the 11th day of March, 1912, an intervention in said suit in the District Court of the United States was preferred by "*County of Multnomah, Oregon, and R. L. Stevens, Sheriff and ex officio Tax Collector for Multnomah County, Oregon,*" alleging and asserting among other things:

"That they have an interest in and a preferred claim and lien upon all of the property and funds in the possession and under the control of the receiver herein."

And further alleging:

"On the 6th day of November, 1907, a receiver was duly and regularly appointed by this court to take charge of all of the property, real, personal and mixed, of the above named The Title Guarantee & Trust Company and said receiver immediately thereafter duly quali-

fied and entered upon the discharge of his duties as such receiver and thereupon took possession of all of said property and ever since has been and still continues in the possession and charge of said property."

(See Record, pp. 13 and 14.)

Thereafter and on the 4th day of April, 1912, the receiver, the appellant herein, excepted to this petition of intervention for insufficiency and in connection with his exceptions made his answer as the same at large and more fully appears.

(Record, pp. 16 to 23.)

Thereafter and on the 8th day of May, 1913, another intervention was filed, as follows:

"Comes now the City of Portland, County of Multnomah and State of Oregon, by Walter H. Evans, District Attorney for the Fourth Judicial District of the State of Oregon, and represents to the above entitled Court and to its officers and agent the receiver of The Title Guarantee & Trust Company, that the said The Title Guarantee & Trust Company is indebted to the City of Portland, to the County of Multnomah and to the State of Oregon, on account of personal taxes as follows, to wit: (Here follows tabulated statement of taxes with penalties for the years 1908 to and inclusive of the year 1911)."

It will be observed (Record, pp. 24 and 25) that the difference between this petition and the petition filed by Messrs. Emmons & Webster, which was then pending, is that:

FIRST. The Evans petition claims for the year 1911;

SECOND. That no claim for the year 1911 was made in the Emmons & Webster petition;

THIRD. That the Evans petition is positively and unequivocally laid in the action *indebitatus assumpsit*;

FOURTH. While the Emmons & Webster petition directly claims "*an interest in and a preferred claim and lien upon all of the property and funds in the possession and under the control of the receiver,*" the Evans petition alleges debt.

FIFTH. Both petitions claim penalties and interest, but in different amounts.

The exhibits attached to the Evans petition (see Record, pp. 27 to 31), indicate the derivation of the tax.

The answer of the receiver appellant herein to the petition in intervention of Walter H. Evans is set forth in the record at pages 31 to 41, inclusive.

Afterwards on the 25th of July, 1913, Messrs. Emmons & Webster filed a demurrer styled a demurrer to answer, but it is not clear to which answer the demurrer was directed and the court below properly disregarded the demurrer, and heard the facts.

(Record, pp. 78 and 79.)

On the 23rd day of March, 1914, following, the court below rendered its opinion (see Record, pp. 43 to 51), wherein it laid the foundation for the order appealed from by directing the receiver to pay the State, County, School and Municipal taxes for the years 1908, 1909, 1910 and 1911, together with the penalty on the

amount of the tax for each year and together with the interest of twelve per cent (12%) accruing between the first Monday in April and the first Monday in May.

Promptly on the 27th of March, 1914, the receiver appellant filed his petition for rehearing found in the record at pages 51 to 73.

On the 23rd day of April, 1914, the court entered the following order:

The court having heretofore, on, to wit: the day of, 1914, heard the testimony upon the questions raised by the two petitions in intervention of Multnomah County, praying that the receiver herein be required to pay the State, County, School and Municipal taxes assessed against the Title Guarantee & Trust Company on certain personal property for the years 1908 to 1911 inclusive, together with the penalties and interest, and the court having heard the arguments, considered the briefs submitted, rendered its opinion thereon, and overruled a motion for re-hearing herein.

It is hereby ordered and directed, that R. S. Howard, Jr., Receiver herein, pay to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee & Trust Company for the year 1908, the sum of \$1,304.00 in taxes, and the further sum of \$130.40, being 10 per cent penalty on the amount of the above taxes, and \$13.04 being interest on the above taxes at 12 per cent from April 5, 1909, to May 5, 1909,

and further that we pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee and Trust Company for the year 1909, the sum of \$747.00 in taxes, and the further sum of \$74.70, being 10 per cent penalty on the amount of the above taxes, and \$7.47, being interest on the above taxes at 12 per cent from April 4, 1910, to May 4, 1910, and further, that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee and Trust Company, for the year 1910, the sum of \$913.00 in taxes, and the further sum of \$91.30, being 10 per cent penalty on the amount of the above taxes, and \$9.13, being interest on the above taxes at 12 per cent from April 3, 1911, to May 3, 1911.

Dated at Portland, Oregon, this 23rd day of April, A. D., 1914.

CHAS. E. WOLVERTON,

Judge.

(See Record, pp. 74 and 75.)

On the 1st day of July, 1914, the appellant presented his petition for appeal and the same was allowed.

(See Record, pp. 166 to 171.)

Notice of appeal bond on appeal, assignment of errors and citation, together with orders relative to the production of testimony and the certification of exhibits were in due course given as more fully appears.

(Record, pp. 171 to 198.)

And accordingly the whole matter comes to this Court for consideration upon the single important and pertinent question presented by this appeal, viz.:

WHETHER UNDER THE LAWS OF THE STATE OF OREGON, PRIOR TO THE AMENDMENT OF 1913, A PERSONAL PROPERTY TAX ASSESSMENT IN THE NAME OF A DEFUNCT CORPORATION THROUGH MERELY PLACING ITS NAME UPON THE TAX ROLL AFTER IT HAD CEASED BUSINESS AND AFTER ALL OF ITS PROPERTY OF EVERY KIND HAD BEEN SURRENDERED TO ITS CREDITORS AND WHILE SAID PROPERTY WAS BEING ADMINISTERED AND DISTRIBUTED THROUGH AND BY A COURT AND RECEIVER, CAN BE MADE AND ENFORCED WITH PENALTIES AND INTEREST AFTER SEVERAL YEARS' DELAY BY AN INTERVENTION IN THE RECEIVERSHIP CAUSE PROSECUTED BY THE AUTHORITIES AS A PREFERRED LIEN OR CLAIM OR BY INDEBITATUS ASSUMPSIT WHEN THE LAWS OF THE STATE AT THE TIME OF INTERVENTION DO NOT PROVIDE FOR SUCH CASES, AND THE SUPREME COURT OF THE STATE HAS EXPRESSLY DENIED SUCH A TAX TO BE EITHER A LIEN OR A DEBT AND DECLARED EQUITY COURTS WITHOUT POWER TO RENDER JUDGMENT THEREFOR?

THE STATUTORY PROVISIONS APPLYING TO THE CASE AT BAR ARE FOUND IN LORD'S OREGON LAWS, VOLUME 2, CHAPTERS III AT PAGE 1411, IV AT PAGE 1415 AND VIII AT PAGE 1459, TO-WIT:

"Section 3551. All real property within this State, "and all personal property situated or owned within "this State, except such as may be specifically exempted "by law, shall be subject to assessment and taxation in "equal and ratable proportion."

"Section 3553. The terms personal estate and personal property shall be construed to include all things "in action, household furniture, goods, chattels, moneys, "and gold dust, on hand or on deposit; all boats and "vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from "solvent debtors, whether on account, contract, note, "mortgage, or otherwise, either within or without this "state; all public stocks; all bonds, warrants, and "moneys due or to become due from this state, or any "county or other municipal subdivision thereof; and "stocks and shares in incorporated companies and such "proportion of the capital of incorporated companies "liable to taxation on their capital as shall not be invested in real estate; and all improvements made by "persons on lands claimed by them under the laws of the "United States, the fee of which lands is still vested in "the United States."

"Section 3560. Every person, except as otherwise "provided by law, shall be assessed in the county in "which he resides when the assessment is made for all

“taxable property owned by him, including all personal estate in his possession, or under his control as trustee, guardian, executor, or administrator; and where there are two or more persons jointly in possession, or having control of any such property in trust, the same may be assessed to either or all of such persons, but it shall be assessed in the county where the same shall lie if either of such persons resides in such county.”

“Section 3563. The personal property of every private corporation is liable to taxation in the same manner as the personal property of a natural person, and shall be assessed in the name of such corporation in the county where the principal place of business of such corporation is located, unless otherwise specially provided by law; but if such corporation is engaged in the business of navigation, then the steamboats or other water craft of such corporation shall be assessed in the county in this state where the home port or berth of such steamer or other water craft may be. The personal property of a private corporation may be seized and sold for any tax levied upon the property of such corporation as in the case of a natural person.”

THE METHOD OF THE ENFORCEMENT AND COLLECTION OF DELINQUENT TAXES ON PERSONALTY IS PROVIDED BY THE LAWS OF OREGON EXCLUSIVELY AS FOLLOWS:

“Section 3683. On or immediately after the first Monday of May in each year the tax collector shall proceed to collect all taxes levied in his county upon

“personal property, of which one-half was not paid as
“hereinbefore provided on or before the first Monday
“of April, together with the penalty and interest. He
“shall levy upon sufficient goods and chattels, belong-
“ing to the person or corporation charged with such
“taxes, if the same can be found in the county, by taking
“them into his possession, to pay such delinquent taxes,
“together with interest, accruing interest, penalties, and
“other lawful charges; and shall immediately advertise
“such goods and chattels for sale by posting written or
“printed notices of the time and place of sale in three
“public places in his county not less than ten days prior
“to such sale, and if such taxes, interest, and penalties
“shall not be paid before the time appointed for such
“sale the tax collector shall proceed to sell such property
“at public vendue, or so much thereof as shall be suffi-
“cient to pay such taxes, interest, and penalties, and
“shall deliver to the purchasers thereof at such sale the
“property so sold to them respectively, and such sale
“shall be absolute; and the tax collector shall proceed
“in like manner, on and after the first Monday in No-
“vember, to collect the residue of taxes charged against
“personal property remaining delinquent on his roll. In
“like manner he shall levy upon and sell the goods and
“chattels of any person or persons removing from the
“county without paying all taxes charged against them.
“Whenever after delinquency, in the opinion of the tax
“collector, it becomes necessary to charge the tax on
“personal property against real property in order that
“such personal property tax may be collected, such tax
“collector shall select for the purpose some particular

“tract or lots of real property owned by the person
 “owing such personal property tax, and shall note upon
 “the tax roll opposite such tract or lots the said tax on
 “personal property, and said tax shall be a lien on such
 “real property from and after the time said tax on per-
 “sonal property is charged against the said real property,
 “and shall be enforced in the same manner as other real
 “estate tax liens.”

DECISIONS OF THE SUPREME COURT OF THE STATE OF OREGON INTERPRETING THESE LAWS

In *Marion County v. Woodburn Mercantile Co.* (119 Pac. 487, decided December 26, 1911), 60 Oregon at page 367, it is held that

“A tax, not being a debt, so that no promise can be implied as a basis of assumpsit therefor, and a method of collecting taxes on personal property being prescribed by Section 3683, L. O. L., no action for personal taxes will lie if before seizure of the personal property; unless he has real estate against which it can be charged, the county is remediless.”

The following decisions interpreting the tax law of the State of Oregon have been made and adhered to, viz:

“That a court of equity is without power to render a money judgment for the amount of personal property taxes.”

**MULTNOMAH COUNTY v. PORTLAND
 CRACKER CO.** (90 Pac. 155, decided May
 21, 1907), 49 Oregon 346.

This was a suit to cancel alleged fraudulent entries on County records and recover the amount of a tax which purported to be cancelled by such entries, the decree granted all the relief asked and the Supreme Court decided that such a decree could not be sustained for the amount of the tax as the statutes afforded sufficient means of collecting the tax without the intervention of a court of equity for the causes in that case presented.

Likewise and to similar effect are:

Mingyue v. Coos Bay Railroad, 21 Ore. 392.

Stemmer v. Insurance Company, 33 Ore. 66 (4th syllabus from the top of page).

Denny v. McCown, 34 Ore. 48.

But the Supreme Court further said in the case of *Marion County*, *supra* (60 Oregon at page 369):

“No lien is impressed by our statute upon personal property, and if an owner thereof removes it to another county, or otherwise dispose of it before his goods and chattels are seized for the payment of delinquent taxes levied upon that class of property, and he has no real estate in the county against which such taxes can be made a lien, and no action can be maintained against him to recover the taxes, the county levying them is remediless, and he is not bearing his share of the public burden. No enactment of this State expressly authorizes the bringing of an action in such a case.”

SPECIFICATIONS OF ERROR

(Rule 24, Sub. 2 (b))

The specification of the errors relied upon showing as particularly as may be in what respect the decree made is alleged to be erroneous are respectfully submitted as follows:

FIRST SPECIFICATION

That the said District Court of the United States in and for the District of Oregon, Judge Charles E. Wolverton sitting, *erred in determining and deciding that the laws of the State of Oregon provide for the assessment of personal property taxes against a receivership or property surrendered to the Court in the hands of its receiver.*

SECOND SPECIFICATION

That the said District Court *erred in determining and deciding that The Title Guarantee & Trust Company still retained a corporate entity for the purpose of winding up its business,* and in that connection in determining and deciding *that it was corporate business that the receiver was transacting* herein *at the time and during the periods the alleged personal property taxes were said to have been assessed.*

THIRD SPECIFICATION

That the said District Court erred in determining and deciding that all property according to the revenue and taxation laws of the State of Oregon is by

those laws assessable, in so far as the Court applied such a determination and decision to personal property in the hands of said receiver.

FOURTH SPECIFICATION

That the said District Court *erred* in determining and *deciding that the Title Guarantee & Trust Company*, for the purposes of applying the law in this case, *was a going concern*, submitting its property in process of dissolution to the action of the taxing authority, whereas in truth and in fact all of the property of The Title Guarantee & Trust Company was surrendered and the officers thereof had released their control thereto and said matters were of record in said Court in the main cause at the time of the filing of the petitions in intervention and before the assessment of the taxes the basis of the petitions in intervention.

FIFTH SPECIFICATION

That the said District Court *erred* in determining and deciding *that the Title Guarantee & Trust Company*, through itself and receiver, *was in possession of property SUBJECT TO TAXATION AS A GOING CONCERN*, for that the bill of complaint upon which said Court acquired original jurisdiction in said main cause submitted said corporation to the jurisdiction for the purposes and upon the facts as in said bill set forth, for more particular identification of which it is in connection with this assignment of errors set forth fully and at large that the point of law based on this assignment of errors may appear clearly, to-wit:—

SIXTH SPECIFICATION

That the said District Court *erred in determining* and deciding *that The Title Guarantee & Trust Company, through itself as receiver, was in possession of property subject to taxation as a going concern* for that the appearance and consent filed by the defendant in said main cause submitted said corporation to the jurisdiction of the court for the purposes and upon the facts as in said appearance and consent set forth, for more particular identification of which it is in connection with this assignment of errors set forth fully and at large that the point of law based on this assignment of errors may appear clearly, to-wit:—

SEVENTH SPECIFICATION

That said District Court *erred* in determining and deciding *that the personal property taxes claimed* for in the petition in intervention *were assessed against property of a going concern in the hands of a receivership* and as if previous to the time when the receivership had occurred, *whereas in truth and in fact this was a proceeding winding up and liquidating all of the property of the corporation, all of the officers of whom had surrendered its corporate entity* to the Court, together with all of its property, including all of its personal property then being distributed to claimants and distributees whose claims had been duly proved and allowed.

EIGHTH SPECIFICATION

That the said District Court *erred in determining* and deciding *that the personal property assessed was the personal property of the corporation or the receiver because the same was a trust fund for the creditors and claimants of the corporation* who as claimants and distributees thereof with proved and allowed claims were entitled to the same.

NINTH SPECIFICATION

That the said District Court erred in determining and deciding said alleged personal property tax was recoverable for the reason that *no business was ever done by the corporation, The Title Guarantee & Trust Company, of any kind or nature whatsoever from and after the 2nd day of November, 1907, long after the alleged assessment of taxes on personalty described in the petitions*, so that there was no personal property of the corporation to be assessed in the same manner as that of a natural person, nor was there any personal property in the hands of the receiver assessed during said period, there being no such class of property defined in the laws of Oregon for assessment and taxation in that state.

TENTH SPECIFICATION

That the said District Court erred in determining and deciding "but where property remains within the jurisdiction and within the hands of the person taxed there is no impediment to the enforcement of the pay-

ment of the personalty tax assessed against him,” and in applying it to this case because *there was no property in the hands of the person taxed belonging to such person as his or its personal property at the time of the alleged tax and an assessment claimed to have been made either to the receiver or to the corporation under the facts of this case did not support the Court’s opinion in that regard.*

ELEVENTH SPECIFICATION

That the said District Court *erred in determining and deciding*—especially when it found that the taxing officers of the petitioner were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands before any of the taxes in question were levied and also found that the taxes which are sought to have paid were assessed a part of the time in the name of the defunct company alone and a part of the time in the name of the receiver, *that the same could be claimed by Multnomah County out of personalty distributed to the various creditors and claimants during the process of administration occurring while said property was said to have been so assessed.*

TWELFTH SPECIFICATION

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

“FOURTH. That all of the so-called personal property mentioned in the intervening petitions, if assessed to The Title Guarantee & Trust Company, has been and was doubly assessed, for that all of such property was the property of the creditors and claimants who presented their claims to the receiver and had said claims approved and allowed during the times and for amounts which represented the actual conversion of the personal property of The Title Guarantee & Trust Company into liquidated assets which were in turn distributed to said creditors and claimants who in turn paid personal property taxes assessed to each of them individually, and *hence it is not competent for Multnomah County to claim that during the same time and in respect to the same property other personal property taxes could be assessed against and collected from The Title Guarantee & Trust Company or its estate.*”

THIRTEENTH SPECIFICATION

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

“FIFTH. The affairs of The Title Guarantee & Trust Company are not in the nature of an operated concern kept alive by a receivership and administered by the court, but upon the 2nd day of November, 1907, it became insolvent, admitted its insolvency, its officers came into court and

surrendered the company to the court, the court took possession of it, appointed its receiver and there has been no corporate management subsequent to such control, except only for the purpose of a more full and better administration of this court."

FOURTEENTH SPECIFICATION

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

"But in this case we are not presented with a situation upon either petition of a tax actually attaching to property previous to any possession by the court. The tax for 1907 could not be leviable as a matter of law until after the 1st of January, 1908, and the Board of Equalization did not sit and determine the tax roll assessment until October, 1907, and before the amount of the tax could be computed for the year 1908 all of the property of The Title Guarantee & Trust Company had passed into possession of the court, hence we have not a case presented here which is likened to the cases that ordinarily arise in the matter of imposition of taxes upon going receiverships."

FIFTEENTH SPECIFICATION

That the said District Court *erred in disregarding and in overlooking and refusing to decide, in conformity with the law of the State of Oregon, that a court of equity is without power to render a*

money judgment for the amount of personal property taxes claimed in the intervening petitions.

SIXTEENTH SPECIFICATION

That the said District Court erred in disregarding the point submitted to it below, viz:—

“The receiver has all along contended that the petitions in this case were not sufficient to justify a recovery. It nowhere appears that the County of Multnomah exhausted its remedies as against the real estate in the name of or claimed to be held by The Title Guarantee & Trust Company and it is only against real estate or against the personal property itself *in situ* that the delinquency can be enforced by a warrant.”

SEVENTEENTH SPECIFICATION

That the opinion and decision of the District Court is directly against and not in conformity with the decisions of the Supreme Court of the United States in the case of *United States v. Whitridge*, receiver, and *United States v. A. H. Jolin, et al.*, receivers, wherein, on writ of certiorari granted March 10, 1913, 227 U. S. 680, said Supreme Court of the United States affirmed the decision of the *Pennsylvania Steel Co. v. New York City* in 190 Fed. 777, on or about the 11th of November, 1913, prior to the trial of this intervention, although said opinion was then submitted to said court on the trial below.

EIGHTEENTH SPECIFICATION

That the said District Court erred in disregarding the point submitted to it below, viz:—

“Fifth. Even bankruptcy courts and the statutes relative to administration of estates provide only for taxes *in esse* at the time of the commission of the act of bankruptcy or the death of the testator and taxes afterwards upon personalty are paid not by the bankruptcy estate or the estate of the decedent, but by those into whose hands the property is distributed.”

NINETEENTH SPECIFICATION

That the said District Court erred in disregarding the testimony and evidence presented upon the hearing as given by the witness Chief of Field Work in the Assessor's office as follows, to-wit:—

“Q. Did you find out, and refresh your memory about R. S. Howard, Jr., receiver, business?

A. No, I didn't look any further in regard to it, Mr. Bristol.

Q. I will call your attention to intervenor's exhibit 2 and ask you if I understand you correctly that this red shows that the same sort of an arbitrary assessment would be made to The Title Company for 1909?

A. Exactly.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. It would be absolutely the same. The red is put on there for the benefit of the Assessor in making comparisons each year.

Q. I am particularly anxious to know whether the name of the receiver would be upon that assessment or that statement at all?

A. Well, that I could not tell you.

Q. Well, it is not on that one, is it?

A. No. That I could not tell you. But the amounts here are taken, these amounts here are taken from the previous.

Q. Yes, I understand that; the previous roll?

A. Yes. But in regard to the name, why, I could not tell you.

Q. Well now, this roll says, 'Title Guarantee & Trust Co.', don't it?

A. Yes.

Q. 'Character of business, banking'?

A. That is the item, the statement there, although the roll might include even more than that.

Q. All right; let's look at it. 6782, line 45, would represent the roll for 1910, wouldn't it?

A. Yes, sir.

Q. That is on Intervenor's Exhibit 2 and is the entry that shows that this statement was entered?

A. Yes, sir, that is it exactly.

Q. I notice on here in blue pencil, 'See Maxwell before entering.' What does that mean?

A. Well, evidently Mr. Maxwell asked something in regard to it. Maybe he wrote it himself. I don't know whether he did or not.

Q. Why was it that Maxwell was always the fellow that was particularly concerned here about this Title Guarantee & Trust Company tax apparently?

A. Well, that I don't know, otherwise than that he was chief deputy in the office. Otherwise I could not tell you.

Q. Now, I show you the 1909 roll at the point and place where line 46 appears, and ask you by what authority anybody would have to enter the name of the Receiver, in view of the fact that you told us this morning on your direct testimony that these entries here were made up from statements previously prepared and that this statement, Intervenor's Exhibit 2, which you say is a proper one, does not show the name R. S. Howard, Jr., Receiver?

A. Well, that would not be any reason why that they could not be added to it, because it is not a tax roll, Mr. Bristol.

Q. Well, but I am getting at the fact that you stated—

A. (Interrupting) It could not be—

Q. (Interrupting) Now, wait a minute. Did I understand you correctly that the foundation for the roll itself is either a previous blank or a previous statement either actually made by the owner or arbitrarily made by the Assessor?

A. Yes, sir.

Q. Is that true?

A. That is true.

Q. Now then, it is also true, isn't it, that Intervenor's Exhibit 2, you told us was the same by reason of these red letters that you identify it by, was the same for 1909 as it was for 1910?

A. Yes, sir. These items—

Q. (Interrupting) Now then, these—

MR. EVANS: (Interrupting) Wait until he gets his answer finished.

MR. BRISTOL: All right. Go ahead.

WITNESS: These items are absolutely the same. (Indicating.) These may not be the same, because if this had changed hands and was under a different name, why, these items would appear, as this was assessment on the particular property.

MR. EVANS: 'This' and 'these' don't get in the record.

Q. (Mr. Bristol) So you did have some information then with regard to the future whether the institution changed hands, did you?

A. Oh, sure.

Q. Now, as a matter of fact, it had changed hands prior to 1909, hadn't it?

A. Yes; part of it was changed hands anyway, before that.

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was con-

stantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced, the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor makes this up, now—

Q. (Interrupting) What you are referring to as 'this,' is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Haward, Jr.'s. name so long as he notifies him.

A. Yes.

Q. Have you got any proof that he ever notified him?

A. Yes.

Q. What?

A. The record shows, you know, the date of the notification, and that is the only person that he could notify.

Q. Where is the record of notification in 1909 that you notified the Receiver?

A. We haven't got it here.

Q. You haven't got it here. Did you notify the Receiver?

A. I always do.

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. Always do, because the Assessor knew—there is no doubt but what he knew The Title Guarantee & Trust Company was in the hands of a Receiver and that R. S. Howard, Jr., was the Receiver.

Q. Now, Mr. Funk, just a minute. I don't want you to make a statement that might be incorrect.

A. I don't want to, either.

Q. I know, but listen. Now let me remind you: You remember that George H. Hill was the first Receiver in this court, don't you, and that he was removed?

A. Yes, I remember he was, yes.

Q. And you remember that next to George H. Hill came Edward C. Mears, who would be the receiver in the year that this assessment was made, 1909.

A. Well then, probably Mr. Mears is the man that—

Q. (Interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. Well, if Mr. Mears was the receiver at the time that this roll was turned over to the Board of Equalization, I haven't any explanation.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in the Board of Equalization in October of 1908, wouldn't it?

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not the 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. In other words, then, if that be the case, there is twelve months yet in our favor that I didn't know about. The roll for this year of 1913, for instance, we went before the Board as taxpayers in October, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

Q. Is that right?

A. The 1st of February.

Q. The 1st of February, yes. Now then, this 1909 roll then would not be subject to collection upon it until the following 1st of February, 1910?

A. That is correct."

TWENTIETH SPECIFICATION

That the said District Court erred in disregarding the evidence and in failing and refusing to find upon *the evidence and the concession made by the intervening petitioner, Multnomah County, upon the trial; the evidence and the concession that the only time and the first time that R. S. Howard, Jr., receiver, was ever assessed was upon roll page 6119, line 12, for 1913, the present roll, pages of the record 79, 80 and 81, and the evidence does not disclose and there was not any evidence tending to show or prove that any assessment was made against the property of The Title Guarantee & Trust Company or its receiver as a going concern or otherwise than as shown on said rolls in the name of The Title Guarantee & Trust Company as if it were a going concern.*

TWENTY-FIRST SPECIFICATION

That the said District Court *erred in determining* and deciding *that Multnomah County, intervening petitioner, could recover penalties and in adjudging and ordering any penalties to be paid upon any of the alleged personal property taxes.*

TWENTY-SECOND SPECIFICATION

That the said District Court erred in determining and deciding in favor of the intervening petitioner, Multnomah County, and against R. S. Howard, Jr., receiver, as follows, to-wit:—

“IT IS HEREBY ORDERED AND DIRECTED, that R. S. Howard, Jr., Receiver herein, pay to the TAX COLLECTOR of Multnomah County, on account of the State, County, School, and Municipal taxes *assessed against the personal property of The Title Guarantee & Trust Company for the year 1908*, the sum of \$1,304.00 in taxes, and the further sum of \$130.40, being 10 per cent penalty on the amount of the above taxes, and \$13.04 being interest on the above taxes at 12% from April 5, 1909 to May 5, 1909, and further that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School, and Municipal taxes *assessed against the personal property of The Title Guarantee & Trust Company for the year 1909*, the sum of \$747 in taxes, and the further sum of \$74.70, being 10% penalty on the amount of the above taxes, and \$7.47, being interest on the above taxes at 12% from April 4, 1910, to May 4, 1910, and further, that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes *assessed against the personal property of The Title Guarantee & Trust Company, for the year 1910*, the sum of \$913.00 in taxes, and the further sum of \$91.30, being 10 per cent penalty on the amount of the above taxes, and \$9.13, being interest on the above taxes at 12% from April 3, 1911 to May 3, 1911.

Dated at Portland, Oregon, this 23rd day of April, A. D., 1914.”

TWENTY-THIRD SPECIFICATION

That the findings and decree of said District Court are against the law and the equity of the case as presented by the intervening petitions and the answers thereto.

BRIEF OF THE ARGUMENT

(RULE 24, SUB. 2 (c).)

Points of Law and Fact Discussed.

THE MAIN OBJECT AND PURPOSE OF THE COY LITIGATION IS A WINDING UP AND LIQUIDATION SUIT AND THE CORPORATION IS AND WAS NOT BEING RUN BY ITS OFFICERS OR MAINTAINED AS A CORPORATION, BUT ON THE CONTRARY SURRENDERED ITS CORPORATE ENTITY TO THE COURT, AND ALL OF ITS PROPERTY, AND PARTICULARLY ALL OF IS PERSONAL PROPERTY, IS AND WAS BEING DISTRIBUTED, SO THAT THERE WAS NO PERSONAL PROPERTY OF THE CORPORATION TO BE ASSESSED IN THE SAME MANNER AS THAT OF A NATURAL PERSON, NOR WAS THERE ANY PERSONAL PROPERTY IN THE HANDS OF THE RECEIVER ASSESSED DURING SAID PERIOD, THERE BEING NO SUCH CLASS OF PROPERTY DEFINED IN THE LAW FOR ASSESSMENT AND TAXATION IN OREGON.

IN THIS CASE WE ARE NOT PRESENTED WITH A SITUATION UPON EITHER PETITION OF A TAX

ACTUALLY ATTACHING TO PROPERTY PREVIOUS TO ANY POSSESSION BY THE COURT. THE TAX FOR 1907 COULD NOT BE LEVIABLE AS A MATTER OF LAW UNTIL AFTER THE 1ST OF JANUARY, 1908, AND THE BOARD OF EQUALIZATION DID NOT SIT AND DETERMINE THE TAX ROLL ASSESSMENT UNTIL OCTOBER, 1907, AND BEFORE THE AMOUNT OF THE TAX COULD BE COMPUTED FOR THE YEAR 1908 ALL OF THE PROPERTY OF THE TITLE GUARANTEE & TRUST COMPANY HAD PASSED INTO POSSESSION OF THE COURT, HENCE WE HAVE NOT A CASE PRESENTED HERE WHICH IS LIKENED TO THE CASES THAT ORDINARILY ARISE IN THE MATTER OF IMPOSITION OF TAXES UPON GOING RECEIVERSHIPS.

And these considerations were promptly moved before and presented to the Court below.

(Record, pp. 69-70; 54 and 55.)

THE RECEIVER HAS ALL ALONG CONTENDED THAT THE PETITIONS IN THIS CASE WERE NOT SUFFICIENT TO JUSTIFY A RECOVERY. IT NOWHERE APPEARS THAT THE COUNTY OF MULTNOMAH EXHAUSTED ITS REMEDIES AS AGAINST THE REAL ESTATE IN THE NAME OF OR CLAIMED TO BE HELD BY THE TITLE GUARANTEE & TRUST COMPANY AND IT IS ONLY AGAINST REAL ESTATE OR AGAINST THE PERSONAL PROPERTY ITSELF IN SUIT THAT THE

DELINQUENCY CAN BE ENFORCED BY A WARRANT.

(Record, pp. 17, 19 and 58, and 31 to 33 *et seq.*)

(Record, Motion to Dismiss, page 163.)

And the receiver-appellant has likewise always contended that the opinion and findings of the Court were against the law, against the evidence and against the equity of the case.

(Record, pp. 88, 191; and pp. 23 and 40.)

Section 3683, Lord's Oregon Laws, Chapter VIII, page 1459, Volume II, exclusively provides the only method for the enforcement of delinquent personal property taxes, and it is quite clear that a *lien does not arise until full compliance with that section.*

It is the law of Oregon, as interpreted, that a personal property tax is not a debt; that *assumpsit* will not lie therefor and that there is no lien for any of the items involved in the case at bar.

As matter of law (Section 3553 L. O. L., *ante*), the item for the years 1908, 1909 to 1911, purporting to consist of "*safe deposit vaults*" are not among the properties mentioned by the statute that can be regarded as personalty, because not so defined.

Moreover, on the 6th day of November, 1907, The Title Guarantee & Trust Company surrendered all of its property for the benefit of all its creditors and upon the accomplishment of that act and the court's possession *the personalty there and then became immediately the property of the creditors of the cor-*

poration and there could be no personalty belonging to The Title Guarantee & Trust Co. until after liquidation of all of the property it should appear that there was an overplus over the amount of all of its debts properly taxable as personalty to that company; AND THESE FACTS WERE NOT PROVED OR SHOWN BY THE INTERVENORS AND THERE IS A TOTAL FAILURE OF PROOF THEREABOUT.

Considering for a moment the testimony offered by the petitioners in connection with the specifications of error (face page 81), the first assessment for 1908 was merchandise and stock in trade, \$62,500.00.

Obviously The Title Guarantee & Trust Company, being a banking corporation, had no merchandise or stock in trade.

Likewise for the year 1909 (record, page 84) merchandise and stock in trade, \$40,000.00; to this the same criticism would apply.

The same is equally true of the year 1910 (record, page 86), and observe that the witness distinctively says (record, page 87) that the roll shows that the character of the business is banking (top of page 87) and obviously merchandise and stock in trade would not fit such a situation.

However, when we come to the assessment for 1911 (record top of page 88), we find the character of the business stated to be *safe deposit vaults* and the same

relative terminology for assessment *merchandise and stock in trade*.

It will be noted that in the trial of the cause (and upon this the specifications of error are most specific, record, page 178, assignments 9, 10, 11, 12 and 19 at page 182 and 20 at page 189), there was an objection to the conduct of the case and a ruling by the Court as to the application of the words "*merchandise and stock in trade*" (record, page 88) and the Court below took a hand in the examination and inquired as follows:

"The Court: That does not include money, notes and accounts?

A. *There is no item in this particular assessment under that heading.*

The Court: *Well I say merchandise and stock in trade does not include money, notes and accounts?*

A. No."

(Record, page 89.)

The intervening petitioners offer no evidence to correct this anomaly; on the contrary, their own witness, on cross-examination, enlarged its application (record, pages 92, 93 and 94) until the Court again took a hand.

(Record, page 96.)

"The Court: Suppose it should turn out that The Title Guarantee & Trust Company were possessed of no merchandise and stock in trade, do you think The Title Guarantee & Trust Company should apply to the Sheriff for correction?

A. Yes, at that time.

Mr. Bristol: And suppose The Title Guarantee & Trust Company at that time was not doing business, had no actual entity in the sense of having a corporation or anything of the kind that was active through its officers and was itself a dead thing, then what?

A. *It is a point that is difficult for me to answer because I have not gone into it thoroughly; the fact of the matter is we have several cases pending."*

In connection with this testimony one of the important witnesses, the chief of the field work in the County Assessor's office of Multnomah County for over nine years, testified among other things relative to this matter as follows:

"Q. Did you find out, and refresh your memory about R. S. Howard, Jr., Receiver, business?

A. NO, I DIDN'T LOOK ANY FURTHER IN REGARD TO IT, MR. BRISTOL.

Q. I WILL CALL YOUR ATTENTION TO INTERVENOR'S EXHIBIT 2 AND ASK YOU IF I UNDERSTAND YOU CORRECTLY THAT THIS RED SHOWS THAT THE SAME SORT OF AN ARBITRARY ASSESSMENT WOULD BE MADE TO THE TITLE COMPANY FOR 1909?

A. EXACTLY.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. IT WOULD BE ABSOLUTELY THE SAME. THE RED IS PUT ON THERE FOR THE BENEFIT OF THE ASSESSOR IN MAKING COMPARISONS EACH YEAR.

Q. I AM PARTICULARLY ANXIOUS TO KNOW WHETHER THE NAME OF THE RECEIVER WOULD BE UPON THAT ASSESSMENT OR THAT STATEMENT AT ALL?

A. WELL, THAT I COULD NOT TELL YOU.

(Record, page 118.)

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was constantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced, the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

(Record, page 121.)

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor marked this up, now—

Q. (Interrupting) What you are referring to as 'this', is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Howard, Jr.'s. name so long as he notifies him.

Q. So long as he notifies him?

A. Yes.

(Record, page 122.)

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. ALWAYS DO, BECAUSE THE ASSESSOR KNEW—THERE IS NO DOUBT BUT WHAT HE KNEW THE TITLE GUARAN-

TEE & TRUST COMPANY WAS IN THE HANDS OF A RECEIVER AND THAT R. S. HOWARD, JR., WAS THE RECEIVER.

Q. NOW, MR. FUNK, JUST A MINUTE. I DON'T WANT YOU TO MAKE A STATEMENT THAT MIGHT BE INCORRECT.

A. I DON'T WANT TO, EITHER.

Q. I KNOW, BUT LISTEN. NOW LET ME REMIND YOU: YOU REMEMBER THAT GEORGE H. HILL WAS THE FIRST RECEIVER IN THIS COURT, DON'T YOU, AND THAT HE WAS REMOVED?

A. YES, I REMEMBER HE WAS, YES.

Q. AND YOU REMEMBER THAT NEXT TO GEORGE H. HILL CAME EDWARD C. MEARS, WHO WOULD BE THE RECEIVER IN THE YEAR THAT THIS ASSESSMENT WAS MADE, 1909.

A. Well then, probably Mr. Mears is the man that—

Q. (Interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. WELL, IF MR. MEARS WAS THE RECEIVER AT THE TIME THAT THIS ROLL WAS TURNED OVER TO THE BOARD OF EQUALIZATION, I HAVEN'T ANY EXPLANATION.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in

the Board of Equalization in October of 1908, wouldn't it?

(Record, page 123.)

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not in 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. IN OTHER WORDS, THEN, IF THAT BE THE CASE, THERE IS TWELVE MONTHS YET IN OUR FAVOR THAT I DIDN'T KNOW ABOUT. THE ROLL FOR THIS YEAR OF 1913, FOR INSTANCE, WE WENT BEFORE THE BOARD AS TAXPAYERS IN OCTOBER, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

(Record, page 124.)

It is important to note that among other things determined by its opinion below, the Court in writing its considerations said:

"A receiver was appointed for The Title Guarantee and Trust Company by this court on November 6, 1907, and the taxes which it is sought to have paid were assessed against the company a part of the time in its name alone, and a part of the time in the name of the company, R. S. Howard, Jr., Receiver.

Now, in the case at bar the taxing officers were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands. This before any of the taxes in question were levied. While it may be the duty of the receiver to pay the taxes legitimately due, or to apply to the court for authority to do so, yet when a question has arisen touching the validity of the tax, and the taxing officers are advised of that fact, the duty is all the more incumbent upon the tax collector to proceed promptly in the proper way to require the payment of such tax."

(Record, pp. 43 and 49.)

The notification and advice to the officers was not controverted, and was specific and complete, before assessment made.

(Record, p. 147.)

(Record, pp. 140, 143, 148, 154, 157, 158.)

Furthermore the only instance of assessment to or in the name of the receiver was the tax roll of 1913; and no evidence was offered to show any such assessment within the time of the petitions.

(Record, p. 161.)

And this point was conceded by the counsel for the intervenors upon the trial.

(Record, pp. 161 and 162.)

Applying these facts to the case, it follows that under the *Evans'* petition in intervention there could not in law be a valid decree for recovery in debt; and under the *Emmons & Webster* petition there could be no re-

covery as for a lien or preferred claim; and certainly, this is true, when the Supreme Court of the State has held *as a rule of property* that the provisional tax collection remedy of section 3683 (*ante*, this brief, p. 9) is exclusive.

It is against the law, moreover, to allow any penalty or any interest.

County Comrs. v. Clarke & Berry, 36 Md. 206.

Blakistone v. State, 117 Maryland 237.

But, although the Court below recognized this rule of law it did not completely apply it (record, pp. 50 and 51) for its order was for "*penalty of ten per cent on amount of the tax for each year, and the interest of 12 per cent accruing between the first Monday in April and the first Monday in May.*" (Record, page 51.) (Record, pp. 74-75.) And this action of the Court is assigned error. (Record, page 189, foot of page.)

The laws of Oregon contain no provision as to receiver; indeed the theory and intent of the law seems plainly to be that the distributees and creditors ARE THE PERSONS LOGICALLY AFFECTED BY THE TAX. At any rate the law does provide an exclusive method of collection; and this appellant-receiver was and is not doing business for the taxing authorities, but for the creditors.

Penn. Steel Co. v. New York City Ry., 176 Federal 477.

Gay v. Hudson River Elec. Power Co., 190 Federal 777.

Further judicial utterance applying to the Oregon system of revenue by taxation arises in a case from Lane County, viz:

Lane County vs. Oregon, 7 Wall. (74 U. S. 71; 19 L. Ed. 101).

wherin it was distinctly held by the SUPREME COURT OF THE UNITED STATES that a tax under the laws of Oregon was not a debt and that the assessment of taxes did not create a debt that could be enforced by a suit or upon which a promise to pay interest could be implied.

This principle was adopted by Chief Justice Chase and is adopted by the State Supreme Court in the Marion County case, supra. It is familiar law and has been decided many times, both in and out of Oregon, that where a statutory remedy is provided it must be followed, and that neither an action at law or a suit in equity can be maintained under such circumstances.

Phipps v. Kelly, 12 Ore. 213;

Mingyue v. Coos Bay Railroad, *supra*;

Pierce County v. Merrill, 19 Wash. 175,

is a direct holding by our sister state upon this proposition.

The language used in the Oregon statutes, *supra*, does not fairly or unequivocally or at all indicate any intent to tax personal property of a corporation that

has passed into the control of its creditors through proceedings in Court taking over such property to be marshaled and distributed.

Pennsylvania v. New York, 193 Fed. 287.

The statutes can not be enlarged to cover cases not clearly within their import.

Pennsylvania Steel Co. v. New York City Ry. Co., (C. Ca. Second Circuit) 198 Fed. 774, p. 775.

The Title Guarantee & Trust Company on November 6, 1907. ***lost for the time being all dominion over its property, had and possessed no property, either personal or real, as a natural person. Whatever function of ownership ever existed as to personal property ceased November 6, 1907; and therefore an assessment of personalty to it was not against the receivership.***

Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 777.

The Supreme Court of the United States affirmed these conclusions, and denied the right of the federal authorities to proceed for excise taxes against receivers in a similar and analagous proceeding.

United States v. Whitridge, 231 U. S. 144.
U. S. Sup. Ct. Adv., op. No. 2, Dec. 15, 1913,
at pages 24 and 25.

United States v. Joline, S. C.

The facts in this case were:

“In the year 1911, petitions were filed in the Circuit Court in behalf of the United States praying for orders directing the receivers to make returns of the net income of the respective railway corporations for the years 1909 and 1910, to the collector of internal revenue, in the manner required by the provisions of the corporation tax law (Act of August 5, 1909, sec. 38; 36 Stat. ch. 6, pp. 11, 112-117.)

“The applications were resisted by the receivers on the ground that the respective corporations did not during the years 1909 and 1910 carry on any business in respect of the property that was in their hands as such receivers; *that they as such receivers managed, controlled and operated the same, and carried on all the business in respect thereto, and received all the income arising therefrom, not acting in place of the directors and officers of the respective companies, but as officers of the court; and that they were therefore not subject to the provisions of the act.*”

(Italics mine.)

Upon this subject matter, Mr. Justice Pitney, writing for the court, gave the opinion:

“And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. *In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the*

“public obligations of the corporations is this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges.

“Without amplifying the discussion, we content ourselves with saying that, having regard to the genesis of the legislation, the constitutional limitation in view of which it was evidently framed, the language employed by the lawmaker, and the reason and spirit of the enactment, all considerations alike lead to the conclusion that the act of 1909 did not impose a tax upon the income derived from the management of corporate property by receivers, under such conditions as are here presented.

Decrees affirmed.”

(Italics mine.)

United States vs. Whitridge, *supra*.

It hardly seems possible to present a stronger analogy than this for authority against the action of the court below. And the assignments of error, and the specifications thereof herein expressly and specifically raise these points.

(Record, pp. 181, 182 and 191.)

It remains to say, only, that the court below seemed to rather adhere to the view that revenue for the state

must be met, because The Title Guarantee & Trust Company was held by the court's receiver, *its entity separately regarded*, "subject to all the burdens and limitations to which the corporation itself was subject under the law, and one of these is the liability to taxation as a natural person. I am clear that a receivership "does not withdraw the corporation from that liability." (Record, p. 45.)

These considerations do not answer our question, however. *No one disputes the corporation's liability.* The Supreme Court in the *Whitridge case, supra*, clearly recognizes it. The Oregon Supreme Court, however, compels the procedure to be in accordance with statute. This record discloses an intervention in an equity case. Liability of the corporation for taxes, after its property has passed to its creditors, has to be determined against property belonging to it, and its property only, and satisfied out of that property only, ***and cannot either in law or equity be satisfied out of property belonging to its creditors and being, when the alleged assessment is made, distributed to such creditors. Indeed at the time the petitions in intervention were filed the property assessed as "SAFE DEPOSIT VAULTS" had been sold and the proceeds distributed in dividends*** (Record p. 131). *The presumptions to be indisputably indulged, therefore, are that the requirements for state revenue were met by taxation of personalty paid by the several creditors as the property actually attempted to be assessed was in and constantly and continually*

being placed in their hands, as distribution upon liquidation progressed.

The receiver appellant is in an attitude so strongly defined, *supra*, by Mr. Justice Pitney in the *Whitridge case*. He is not an officer of the corporation. His possession is and was ***“an ouster of corporate management and control.”***

How can a valid judgment order or decree, then, in view of these considerations, be entered against the receiver? The corporation's liability is confessedly its personal liability. The assessment in the same manner *“as a natural person”* depends upon possession. The liability is strictly personal to the owner of the personal property assessed. The statute so states. *How then can it be said that the court's decree is right, for upon interventions in equity without any conformity to the exclusive statutory proceeding specified, an interlocutory decree is entered against the funds of the creditors in the hands of its receiver appellant?* Nevertheless, it was done.

(Record, pp. 74 and 75.)

The intervenors took their real property taxes during all this period from 1907 to 1911 without once assessing the receiver, or applying to the court to reach their present end until five years after the court took possession; but the tax on realty is a lien. The tax on personalty is neither a debt nor a lien, until steps provided by statute fructify into an enforceable demand. The intervenors took no such steps. The officers assessing never once assessed the receiver appellant, for personalty tax.

How is it equitable or right to take now from the funds of the creditors, "*as upon a preferred lien or claim*" when no lien is given, or upon *assumpsit* when no debt exists, personal property taxes in favor of intervenors appellees together with penalty and interest? Nevertheless, it was done.

(Record, pp. 74 and 75.)

Or, these things are about to be done if the decree is sustained, and enforced.

This decree, however, says each assessment claimed for is "*against the personal property of The Title Guarantee and Trust Company.*" (See Record, pp. 74 and 75.)

What becomes, therefore, of the preferred lien or claim (Record, pp. 13 and 14) of the EMMONS & WEBSTER PETITION as against creditors?

The decree is not in conformity with those alleged facts.

What becomes, therefore, of the ASSUMPSIT demand of the Evans petition (Record, pp. 24 and 25) which in truth is laid against The Title Guarantee & Trust Co., not the receiver?

The decree is not in conformity with these facts because it orders and directs the receiver-appellant to pay the tax collector out of the funds of the preferred and general creditors, whose claims previously attached.

Besides this, the remedy at law was always available.

Consequently the decree is against the law and equity of the case, and it is respectfully submitted that error lies in the respects assigned and specified, and the receiver appellant, as to the direction and order upon him to pay the said taxes so claimed, should be exonerated therefrom, and the said decree reversed, so that creditors and claimants may not be prejudiced and full equity be done.

If the court thinks the intervening petitioners are nevertheless entitled to their demands, though without conformity to statute, then they should be postponed until the final dismissal of the main case and discharge of receiver appellant with leave or direction then only to enforce their alleged demand against surplus funds if any actually remaining the property of The Title Guarantee & Trust Company, as upon proof and submitted evidence may then be established.

The decree is clearly by virtue of the assumption that after 1907 the Title Guarantee & Trust Company was possessed of property taxable as personalty the same as a natural person; but it conclusively appears it had none such; indeed, nothing but its empty corporate name, against which intervenors are claiming the right to proceed, **but in the name of the receiver, and obtain satisfaction out of creditors' funds in his hands yet to be realized or distributed. The Supreme Court of the United States would not allow the Federal Government to do so; then, why should this Court permit it to be done in this case,**

where the laws of the State designate a special procedure, and the highest court of the state denies such a right to litigants in its own court.

Respectfully submitted,

WILLIAM C. BRISTOL,

Attorney for Appellant.

September 5th, 1914.

No. 2455

IN
The United States Circuit
Court of Appeals
Ninth Circuit

N. COY
COMPLAINANT

VS.

THE
TITLE GUARANTEE & TRUST COMPANY, a
Corporation; J. THORBURN ROSS,
GEORGE H. HILL, et al
DEFENDANTS

MULTNOMAH COUNTY, OREGON, et al,
Intervenors, Respondents
APPELLEES

R. S. HOWARD, Jr.,
Receiver of The Title Guarantee & Trust
Company, Intervenor
APPELLANT

Brief of Appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE DISTRICT OF OREGON

WALTER H. EVANS, District Attorney for Multnomah
County, Oregon, and

ROBERT F. MAGUIRE, Deputy District Attorney,
For Appellees

WILLIAM C. BRISTOL,
For Appellant

FILED

SEP 21 1914

No. 2455

IN

**The United States Circuit
Court of Appeals
for the Ninth Circuit**

MULTNOMAH COUNTY, et al.,
Intervenors, Respondents, Appellees,

vs.

R. S. HOWARD, Jr.,
Receiver of The Title Guarantee & Trust Company,
Appellant,

In the main cause of
N. COY,
Complainant,

vs.

THE TITLE GUARANTEE & TRUST
COMPANY, et al.,
Defendants.

BRIEF OF APPELLEES

BRIEF OF THE ARGUMENT.

(Rule 24, Sub. 2 (c.))

The important question involved in this appeal seems to be whether or not under the laws of the State of Oregon taxes assessed prior to the year 1913 upon the personal property of a corporation in the hands of a receiver constitute a claim which the receiver should be directed by the Court to pay from the assets of the corporation. Since the opinion of Mr. Justice Wolverton deciding this question affirmatively is copied in full in the record (pages 43-51 incl.) (Rep. 212 Fed. 520), the appellees do not deem it necessary in preparing this brief to do more than call the attention of the Court to the following authorities sustaining the decision thus rendered in the District Court.

“A Court having in its charge, or under its control, a fund, or other property, upon which taxes are due, will, as the representative of the sovereignty direct them to be paid without raising any question of the means of enforcement by process, and before all other claims except judicial costs. Thus upon proper application and suitable proof a receiver will be ordered to satisfy a tax assessed against the property in his hands, and a like direction will be made in other cases where funds are held subject to the authority of the Court.”

“Taxes levied upon personal property in the hands of a receiver become a charge upon the estate, and are properly payable by the receiver as a part of the costs and expenses of the administration of the trust. And the fact that the taxes are assessed in the name of the insolvent over whom the receiver is appointed rather than in the name of the receiver, constitutes no objection against the validity of the tax, nor will it avail against the tax that there is no averment or proof that there are sufficient funds in the hands of the receiver to pay the tax in question.” High on Receivers (Fourth Edition) § 881a. (Citing *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184).

“As illustrating the exclusive character of the receivers’ possess and the jealousy with which it is guarded by the Court, it is held that property in the possession of a receiver appointed by a Federal Court, as in the case of a receivership over a railway, while subject to taxation under the laws of the state in which it is situated, cannot be levied upon and sold by an officer of the state in satisfaction of unpaid taxes. The remedy of the officer in such case should be sought by intervention in the suit in which the receiver was appointed.” High on Receivers (Fourth Edition), § 140a.

“Property in the hands of a receiver of any Court, either of a state or of the United States, is as much bound for the payment of taxes, state, county and municipal, as any other property. Generally a valid tax upon property of a corporation in the hands of a receiver con-

stitutes a claim upon its assets within the jurisdiction, superior to every other claim, except judicial costs. It is the duty of the Court not only to respect this paramount right, and to make no order for the distribution of assets **in custodia legis**, except in subordination thereto, but also to make such orders as will compel the receiver to discharge this obligation. The lien of the state for taxes does not rest upon net income alone, but upon all and every part of the property which may be in the hands of the receiver, and therefore, where application is made to the Court by the officers charged with the collection of taxes, for direction to the receiver to pay the same, the Court ought either to direct that the receiver sell a part of the property committed to his care, and thus realize a sum sufficient to pay this charge, or it should give such direction to the receiver as would enable him, without sale, to bring about a like result; and especially is this true where, under management of the receiver, the taxes due the state and counties have been permitted to accumulate and pass unpaid for several years. It is not necessary for the Court to await the end of the litigation, and until final decree, to order the tax paid." 34 Cyc. 346. (See also 23 A. & E. Encyc. of Law 1072).

Where the Federal Courts have appointed a receiver of the property of a judgment debtor in Missouri, and have ordered the property sold, and the receiver has been in possession thereof during the time when a levy might have been made thereon

for taxes on the personalty, the Court will direct the payment of such taxes out of the proceeds of the sale in preference to all other claims, though the sale was ordered to be made "subject to all liens for taxes," as taxes on personalty are not a lien thereon until levy under the tax bill, in Missouri.—*George v. St. Louis Cable & W. R. Co.* (C. C.) 44 Fed. 117.

Property in the hands of a receiver of a Federal Court is bound for the payment of state taxes in the same manner as any other property, but when a receiver believes a tax to be invalid it is his right and duty to apply to the Court appointing him for protection.—*Ex parte Chamberlain* (C. C.) 55 Fed. 704.

The liability of a railroad company to taxation is not affected by the fact that the corporation is in the hands of a receiver, under chancery proceedings against it as an insolvent corporation. Such receiver takes and holds subject to all the liabilities of the corporation.—*New Jersey Southern R. Co. v. Board of Railroad Com'rs.*, 41 N. J. Laws (12 Vroom) 235.

The fact that a corporation is in the hands of a receiver appointed by a decree of a Federal Court does not deprive the state of its right to a settlement for a tax imposed by law on its gross receipts.—*Philadelphia & R. R. Co. v. Commonwealth*, 104 Pa. 80.

Taxes accruing against the property of an insolvent railroad company constitute a preferred claim, and are entitled to be paid in full, including interest, penalties, and costs, before any other claims, except the judicial costs.—*First Nat. Bank v. Ewing*, 103 F. 195; 43 C. C. A. 150; *Smith v. House*, Id.; *Galveston, H. & H. Ry. Co. v. Same*, Id.; *St. Charles Car Co. v. Same*, Id.; *Corbett v. Same*, Id. (Citing *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 481, 29 L. Ed. 979).

A valid tax upon property of a corporation in the hands of a receiver constitutes a claim upon its assets within the jurisdiction, superior to every other claim except judicial costs. But this lien must be enforced by and under the sanction of the Court.—*Ledoux v. La Bee*, 83 F. 761.

A creditor of an insolvent corporation cannot complain of the act of its receiver in paying taxes out of the rents and profits, where they were subject to the deficiency arising on a sale of the premises under a mortgage which also included such rents and profits.—*First Nat. Bank v. Illinois Steel Co.*, 51 N. E. 200, 174 Ill. 140, affirming judgment (1897) 72 Ill. App. 640.

Where property coming into the hands of a receiver is subject to a lien for taxes, for the enforcement of which no specific remedy is provided by statute, the Chancery Court, of which the receiver

is an officer, has jurisdiction, by reason of his possession of the property, to provide payment of the taxes, as a preferred claim, out of the proceeds of the property.—*Duryee v. United States Credit-System Co.*, 37 A. 155, 55 N. J. Eq. 311.

Under 13 St. 99, authorizing the creation of national banks, and providing that nothing in the act is to exempt the real estate of such banks from either state, county, or municipal taxes, the interest and penalties accrued on delinquent taxes are as much a legal claim of the state as are the taxes, and orders for the distribution of assets in the hands of a receiver should be made in subordination to the paramount right of the state to such taxes, penalties and interest. Judgment, *United States Nat. Bank v. Logan Co.* (Sup. 1897) 51 P. 97, modified.—*Gray v. Logan County*, 54 P. 485, 7 Okl. 321.

Where land or other property is under the control of a court of equity in receivership proceedings, the payment of taxes must be secured through the authority of the Court.—*Blackstone v. State*, 83 A. 151, 117 Md. 237.

In this appeal counsel for the appellant seems to rely principally upon the case of *United States v. Whitridge*, 231 U. S. 144. A comparison of that case with the case at bar, however, discloses that the facts in the *Whitridge* case were altogether different from the facts involved in the case now under consideration. In the case at bar the appellees

are seeking to recover from the appellant taxes on **personal property**. The Whitridge case was a proceeding to recover from the receiver of an insolvent corporation the **corporation tax** provided for by the Corporation Tax Law of 1909. We quote as follows from the opinion rendered in that case:

“As repeatedly pointed out by this Court, the Corporation Tax Law of 1909—enacted, as it was, after Congress had proposed to the Legislatures of the several states the adoption of the Sixteenth Amendment to the Constitution, but before the ratification of that Amendment—imposed an excise or privilege tax, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this Court in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of a previous law (Act of August 27, 1894, 28 Stat., c. 349, pp. 509, 553, §27, etc.) to be unconstitutional because amounting in effect to a direct tax upon property within the meaning of the Constitution and because not apportioned in the manner required by that instrument.

“As was said in *Flint v. Stone-Tracey Co.*, 220 U. S. 107, 145, respecting the act of August 5, 1909—‘The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one

per centum upon the entire net income over and above \$5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity.' This interpretation was adhered to and made the basis of decision in *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, and *McCoach v. Minehill Railway Co.*, 228 U. S. 295, 300.

"A reference to the language of the act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.

"And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate ex-

istence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges." (U. S. v. Whitridge 231 U. S. Pages 148-149).

We submit that this decision in the Whitridge case, clearly emphasizing, as it does, the fact that the tax involved in that case, was not in any sense a tax upon property, does not in any manner tend to support the contention of the appellant in the case at bar.

Counsel for the appellant also cites the case of Marion County v. Woodburn Mercantile Co., 60th Oregon 367, 119 Pac. 487. That case, however, merely decides that when all the property of the person taxed is taken into another state, or disposed of, the tax collector will be left remediless in forcing collection. That principle has no application in the present case, since in this case assets of the corporation are still in the hands of the receiver and within the jurisdiction of the Court.

In conclusion we quote as follows from the decision in the case of *Greeley v. The Provident Savings Bank*, 98 Mo. 458:

“The amount of the taxes was undisputed, and the receiver had in his hands funds sufficient to pay them, and we think the order should have been made. It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets (Acts, 1881, p. 180, Sec. 7; *Ib.* p. 35; *State to use v. Rowse*, 49 Mo. 586), a right which it could have enforced through its revenue officers by the summary process of distress (R. S. 1879, Sec. 6754) but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which, depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it, and to make no order for the distribution of assets in custodia legis except in subordination to that right.”

It is submitted that the decision and order of the District Court should be affirmed.

Respectfully submitted,

WALTER H. EVANS,
District Attorney for Multnomah County, Oregon.

ROBERT F. MAGUIRE,
Deputy District Attorney.

GEORGE MOWRY,
Deputy District Attorney.

ATTORNEYS FOR APPELLEES.

No. 2455

IN

The United States Circuit Court of Appeals

Ninth Circuit

N. COY

COMPLAINANT

VS.

**THE TITLE GUARANTEE & TRUST COM-
PANY, a Corporation;**

**J. THORBURN ROSS, GEORGE H. HILL, et al
DEFENDANTS**

**MULTNOMAH COUNTY, OREGON, et al
Intervenors, Respondents**

APPELLEES

R. S. HOWARD, Jr.

**Receiver of The Title Guarantee & Trust
Company, Intervenor**

APPELLANT

Petition for Rehearing

Filed

**WILLIAM C. BRISTOL
For Petitioner**

FEB 15 1915

**F. D. Monckton,
Clerk.**

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

MULTNOMAH COUNTY, et al.,
Intervenors, Respondents, Appellees,

vs.

R. S. HOWARD, JR.,
Receiver of The Title Guarantee & Trust Company,
Appellant,

In the Main Cause of

N. COY,
Complainant,

vs.

THE TITLE GUARANTEE & TRUST COM-
PANY, et al.,
Defendants.

Petition for Rehearing

TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT:

The appellant feeling himself aggrieved herein by
the decision, judgment and opinion of this Court given
and rendered on Monday, the 1st day of February, 1915,

respectfully presents this his petition for a rehearing and for cause and ground therefor doth, with considerations of propriety and respect, show and represent:

First:

The following point was submitted to the Court in the record under the specifications of error and overlooked by it:

“Moreover, on the 6th day of November, 1907, The Title Guarantee & Trust Company surrendered all of its property for the benefit of all of its creditors and upon the accomplishment of that act and the court’s possession **THE PERSONALTY THERE AND THEN BECAME IMMEDIATELY THE PROPERTY OF THE CREDITORS OF THE CORPORATION AND THERE COULD BE NO PERSONALTY BELONGING TO THE TITLE GUARANTEE & TRUST COMPANY UNTIL LIQUIDATION OF ALL OF THE PROPERTY** it should appear that there was an overplus over the amount of all of its debts properly taxable as personalty to that company; **AND THESE FACTS WERE NOT PROVED OR SHOWN BY THE INTERVENORS AND THERE IS A TOTAL FAILURE OF PROOF THEREABOUT.**”

(Pages 32 and 33 of main brief.)

Second:

The following point was submitted in the main brief and in the specifications of error and disregarded and overlooked by the Court:

“FURTHERMORE THE ONLY INSTANCE OF ASSESSMENT TO OR IN THE NAME OF THE RECEIVER WAS THE TAX ROLL OF 1913; AND NO EVIDENCE WAS OFFERED TO SHOW ANY SUCH ASSESSMENT WITHIN THE TIME OF THE PETITIONS.

(Record, p. 161.)

AND THIS POINT WAS CONCEDED BY THE COUNSEL FOR THE INTERVENORS UPON THE TRIAL.

(Record, pp. 161 and 162.)”

(Page 40 of main brief.)

And again in the main brief on page 43:

“The Title Guarantee & Trust Company on November 6, 1907, LOST FOR THE TIME BEING ALL DOMINION OVER ITS PROPERTY, HAD AND POSSESSED NO PROPERTY, EITHER PERSONAL OR REAL, AS A NATURAL PERSON. WHATEVER FUNCTION OF OWNERSHIP EVER EXISTED AS TO PERSONAL PROPERTY CEASED NOVEMBER 6, 1907; AND THEREFORE AN ASSESSMENT OF PERSONALTY TO IT WAS NOT AGAINST THE RECEIVERSHIP.

Pennsylvania Steel Co. v New York City Ry. Co., 198 Fed. 777.

(Page 43 of main brief.)

Third:

It is submitted that the opinion of the Court does not apply fundamental considerations which it uses with reference to taxation to the facts in the case at bar. For illustration, the Court in its opinion quotes from Cooley on Taxation. (See opinion last part of first paragraph on page 4) :

“THUS UPON PROPER APPLICATION AND SUITABLE PROOF A RECEIVER WILL BE ORDERED TO SATISFY A TAX ASSESSED AGAINST THE PROPERTY IN HIS HANDS, AND A LIKE DIRECTION WILL BE MADE IN OTHER CASES WHERE FUNDS ARE HELD SUBJECT TO THE AUTHORITY OF THE COURT.” (Opinion page 4.)

It is submitted that the Court has disregarded in this case the very essentials of the proposition asserted by the learned author. For in this case: *First, there was no proper application; second, there has not been suitable proof; and, third, there was no proof that any funds were held subject to the payment of this tax;* but the appellant sets out in his brief these very points (at pages 33, 46 and 48 and the evidence on page 38) to the contrary and there is not any denial of the same or other proof.

Fourth:

The whole of the Court's decree or order appealed from is set forth in the brief at page 29, and it is obvious from the reading of it and upon the face of it that the

Court only decreed upon the petitions for the years 1908, 1909 and 1910 *and not for the year 1911 at all*, and to that extent at least the suppositions of the learned Judge who writes the opinion on appeal are erroneous *for the reason that the Court below never did pass an order for the tax of 1911.*

But it is further respectfully shown that a close inspection of the order of the lower court shows that in each instance the sum ordered and adjudged to be recovered is the sum that was "*assessed against the personal property of The Title Guarantee and Trust Company for the year,*" but the entire evidence which is placed in the record does not show any such thing.

For instance, see the excerpts on pages 34 and 35 of the brief, which apparently escaped the attention of the Court, and also on pages 37 and 38, **AND THE ONLY ASSESSMENT TO OR IN THE NAME OF THE RECEIVER WAS THE TAX ROLL OF 1913.**

Fifth:

It is further respectfully shown that uniformity upon the same subject matter among the appellate courts of the several circuits of the United States is desirable and necessary, and that therefore this Honorable Court would be pleased to be in accord with the Circuit Court of Appeals of the Eighth Circuit.

That said Circuit Court of Appeals of the Eighth Circuit, through Judges Sanborn, Smith and Treiber, on the 10th day of September, 1914, in a decision published to the profession on the 24th day of December,

1914, in the case of **MIDLAND GUARANTY & TRUST COMPANY v. DOUGLAS COUNTY**, (217 Fed., p. 361) decided that where the receiver himself has listed property under a statute providing therefor (see 217 Federal, p. 361) and the corporation itself is hopelessly insolvent, then the receiver can be held for the taxes; and further held:

“THE LAW HAVING PROVIDED ADEQUATE MEANS FOR COLLECTION, THAT REMEDY IS EXCLUSIVE.”

Sixth:

It will be noted that in the Midland Guaranty case the trustee was made a party. It was a mortgage foreclosure and the Court had ordered the receiver to pay the balance in his hands on liens adjudged paramount to the mortgage being foreclosed; that the receiver had returned a schedule of the properties to the Board for taxation and that a levy was made of the taxes due the several Counties, and on the 10th day of November, 1913, the Counties demanded of the receiver the payment of the taxes **AND THE RECEIVER APPLIED TO THE COURT FOR ITS ORDER AND DIRECTION IN THE PREMISES**; the Court found that they should be paid and the trustee appealed to the Circuit Court of Appeals of the Eighth Circuit.

Seventh:

The case shows that Nebraska has a particular and special law providing as follows:

“Personal property should be listed in the manner following * * * 7. The property of a corporation whose property is in the hands of receivers, by such receiver.”

THERE IS NO SUCH LAW IN OREGON.

Eighth:

The Court, however, says in considering these matters (217 Federal, page 362), having reference to the special statutory provision for the assessment of personal property taxes against property in the hands of receiver, that “if the railroad was legally assessed to the receiver as owner, as this was a tax on personal property, it was not only a lien upon all personal property of the receiver as such, but was a personal claim against him as such receiver.”

Ninth:

It is perfectly obvious that there being no such law in Oregon it took the special and particular provisions of the statute in Nebraska to bring about such a legal result, for the Court continues to say, having reference to the Nebraska statute, which specifically provides for receiverships, that as the railroad was hopelessly insolvent the taxes would be lost to the Counties unless they were collectible from the receiver under some provisions of the statute of Nebraska referred to, and the Court concludes that they were so collectible, but in this cause the evidence does not negative the ability of the company ultimately to pay after creditors are satisfied.

Tenth:

But the strong inferences are that without special provision of the Nebraska statute, the full intent and meaning of the Court quite obviously shows that there is no method of reaching personal property in the hands of a receiver for taxes, even in Nebraska.

It is respectfully submitted that the opinion of the Circuit Court of Appeals for the Eighth Circuit, and particularly the fact that there was in that case considered on the appeal of the trustee, *not of the receiver*, the specific statutory provisions of the State of Nebraska, in connection with the facts on the record in the cause before the Court here, a case has not been made which brings the intervenor within the law as it is in Oregon.

We are not dealing with general policy or expediency.

Within view of the foregoing, there being no statute in Oregon, the Supreme Court of the United States in *Lane County v. Oregon*, 7 Wallace 71, 19 Law. Ed. 101, both the Supreme Courts of the States of Oregon and Washington having decided that the statutory remedy must be followed (see cases cited in main brief, page 42), and it not being disproved that there were other assets after the creditors are paid out of which the intervenors demand against The Title Guarantee & Trust Company might be satisfied **there can be no recovery in this case upon the present intervenors' petitions as matter of law.**

It is respectfully submitted that the Court has overlooked the character of the application in this case, has

failed to see that suitable proof was not made of the tax, and has failed to recognize that there was no disproof of funds remaining over belonging to The Title Guarantee & Trust Company after all the creditors were paid to satisfy this tax, and finally that the decree of the Court below does not give as much to the intervenors as the present decision of this Court rendered February 1st undertakes to do; that is, this Court enlarges the lower Court's order.

The order of the 23rd of April, 1914, appealed from is squarely against *the fifteenth and sixteenth specifications of error*, which fact seems to have escaped the attention of the appellate court. Even if the prayers of the intervening petitions were granted, the order made is not in conformity therewith.

It is respectfully submitted that this Court of Appeals will not go further in decreeing payment of taxes than the Court below saw fit to go with its own receiver even if it finally concludes, in view of this petition, to reaffirm this decision, and the taxes for 1911 are not included in the order appealed from.

WHEREFORE, your petitioner doth say that he is especially aggrieved by the judgment, order and decision of affirmance wherein the order of April 23, 1914, and matters in addition thereto are adjudicated and yet leaves out of consideration the matters and things hereinbefore referred to in the particulars explained, and so it is that your petitioner prays a reconsideration of the decree of affirmance that full and complete justice may

be done, and if it be that this Court shall see fit to consider for the reasons given and a rehearing grant that such further order or direction be made so that the judgment, order and decree of April 23, 1914, may be in conformity with law and the facts and all questions upon the record determined, and your petitioner will ever pray.

R. S. HOWARD, JR.,

Receiver of The Title Guarantee & Trust Company,
Appellant.

WILLIAM C. BRISTOL,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA, }
 State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,
Counsel for Petitioner.

No. 2458

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE NATIONAL BANK OF COMMERCE, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Northern Division.

Filed

SEP 22 1914

F. D. Monckton,
Clerk.

No. 2458

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corporation,

Defendant.

Names and Addresses of Counsel.

J. A. KERR, Esq., Attorney for Defendant and
Plaintiff in Error,

E. S. McCORD, Esq., Attorney for Defendant and
Plaintiff in Error,

1309-1316 Hoge Building, Seattle, Wash-
ington.

CLAY ALLEN, Esq., Attorney for Plaintiff and
Defendant in Error,

G. P. FISHBURNE, Esq., Attorney for Plaintiff
and Defendant in Error,

310 Federal Building, Seattle, Washington.

[1*]

*Page-number appearing at foot of page of original certified Record.

*United States Circuit Court, Western District of
Washington, Northern Division.*

1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpo-
ration,

Defendant.

Complaint.

For a cause of action against the defendant the plaintiff states:

I.

That the defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the United States relating to the organization of national banks, and engaged in such banking business as a national bank at the city of Seattle, in said Western District of Washington.

II.

That during the years of 1907, 1908 and 1909, one M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said times this plaintiff deposited, and caused to be deposited with the defendant, large sums of money to the credit of the said McCoy, to be by him used solely for the purpose of making payment of the expenses which he might be authorized to incur for the plaintiff as such

Examiner and Special Disbursing Agent.

III.

That said deposits were so made with said defendant as a Government depository, and in accordance with the statutes of the United States, and the regulations of its Treasury Department relating to deposits and disbursements of public moneys. [2]

IV.

That said McCoy did, at various times as hereinafter set forth, illegally, fraudulently, and without any authority from this plaintiff, draw checks on the defendant aggregating in amount the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, payable to the order of fictitious payees, and thereafter at various places in the State of Washington and in the State of Montana, forge the endorsements of the names of such fictitious payees, and afterward procured from various banks in said states for his own use the sums of money for which said checks were so drawn.

V.

That the defendant, when said checks were presented to it from time to time, wrongfully and without authority from this plaintiff, charged the respective amounts thereof against the said deposits of this plaintiff.

VI.

That a list of said checks showing their respective dates, amounts and names of payees, is hereto attached, marked exhibit "A" and by this reference made a part of this complaint.

VII.

That said forgeries were not discovered by this plaintiff until on or about September 30, 1909, prior to which time of discovery, this plaintiff, relying upon the representations of the said defendant that said endorsements so made by said McCoy were genuine, had by mistake credited the said defendant with the said aggregate amount of said checks.

VIII.

That upon making such discovery, plaintiff notified the defendant thereof, and thereafter, to wit, on March 5, 1910, demanded of and from the defendant the payment of said sum of \$15,129.81, which had been so credited to the defendant by mistake on account of said forged endorsements. [3]

IX.

That defendant refused and still refuses to make payment of said amount, or any part thereof.

X.

That there is now due and owing the plaintiff from the defendant on said account, the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, together with interest thereon since March 5, 1910, at the rate of 6% per annum, which the defendant neglects and refuses to pay.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, together with interest thereon at the rate of 6% per annum from March 5, 1910,

until paid, and for its costs and disbursements herein.

ELMER E. TODD,

United States Attorney.

W. G. McLAREN,

Assistant United States Attorney.

The United States of America,

Western District of Washington,—ss.

W. G. McLaren, being first duly sworn, on oath deposes and says: That he is an assistant United States Attorney for said Western District of Washington, and is attorney for the plaintiff herein and makes this verification for and in its behalf; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

W. G. McLAREN.

Subscribed and sworn to before me this 22d day of December, 1910.

[Seal]

W. D. COVINGTON,

Deputy Clerk U. S. Circuit Court, Western District of Washington. [4]

Exhibit "A" [to Complaint].

| No. | Date. | Payee. | Amount. |
|-----|---------------|-----------------|----------|
| 1 | Oct. 14, 1907 | Albert Peterson | \$ 20.00 |
| 2 | " 14, " | Nels Anderson | 20.00 |
| 3 | " 14, " | Wm. Jager | 60.00 |
| 4 | " 14, " | H. Berggren | 47.50 |
| 5 | " 31, " | F. L. Day | 28.00 |
| 6 | " 31, " | G. Hoge | 28.00 |
| 7 | " 31, " | Frank Engberg | 96.00 |
| 8 | " 31, " | Chas. Lund | 78.75 |
| 9 | " 31, " | J. D. King | 62.00 |

6 *The National Bank of Commerce vs.*

| No. | Date. | Payee. | Amount. |
|-----|---------------|---------------|---------|
| 10 | " 31, " | F. M. Clark | 62.00 |
| 12 | Nov. 30, " | F. L. Day | 52.50 |
| 13 | " 30, " | G. Hoge | 52.50 |
| 14 | " 30, " | Frank Engberg | 180.00 |
| 15 | " 30, " | Chas. Lund | 150.00 |
| 16 | " 30, " | J. D. King | 60.00 |
| 17 | " 30, " | F. M. Clark | 60.00 |
| 19 | Dec. 31, " | F. L. Day | 54.25 |
| 20 | " 31, " | G. Hoge | 54.25 |
| 21 | " 31, " | Frank Engberg | 186.00 |
| 22 | " 31, " | Chas. Lung | 155.00 |
| 23 | " 31, " | F. M. Clark | 62.00 |
| 24 | " 31, " | J. D. King | 62.00 |
| 26 | Jan. 10, 1908 | F. L. Day | 17.50 |
| 27 | " 10, " | G. Hoge | 17.50 |
| 28 | " 10, " | Frank Engberg | 60.00 |
| 29 | " 10, " | Chas. Lung | 50.00 |
| 30 | " 13, " | J. D. King | 26.00 |
| 31 | " 13, " | F. M. Clark | 26.00 |
| 43 | May 6, " | John Jabelson | 27.50 |
| 44 | " 6, " | John S. Cole | 36.00 |
| 45 | " 31, " | J. D. King | 62.00 |
| 46 | " 31, " | F. M. Clark | 62.00 |
| 47 | " 31, " | A. J. Whitney | 54.25 |

[5]

| | | | |
|----|--------------|---------------|----------|
| 48 | May 31, 1908 | H. M. Benson | \$125.00 |
| 49 | " 31, " | C. A. Thrapp | 150.00 |
| 50 | June 10, " | H. M. Benson | 48.75 |
| 51 | " 10, " | C. A. Thrapp | 72.00 |
| 52 | " 23, " | J. E. Scherer | 78.00 |
| 53 | " 23, " | H. M. Benson | 63.75 |

United States of America.

7

| No. | Date. | Payee. | Amount. |
|------|----------------|----------------|----------|
| 54 | " 30, " | J. D. King | 69.33 |
| 55 | " 30, " | F. M. Clark | 60.00 |
| 56 | " 30, " | A. J. Whitney | 54.25 |
| 57 | " 30, " | H. A. Moore | 63.00 |
| 58 | " 30, " | D. H. Sullivan | 12.25 |
| 59 | " 30, " | Geo. D. Cook | 14.00 |
| 60 | " 30, " | F. W. McCulley | 14.00 |
| 61 | " 30, " | S. F. Cady | 12.25 |
| 62 | " 30, " | H. M. Benson | 54.00 |
| 2 | July 31, " | J. D. King | 100.00 |
| 3 | " 31, " | F. M. Clark | 62.00 |
| 4 | " 31, " | Geo. D. Cook | 62.00 |
| 5 | " 31, " | F. M. McCulley | 62.00 |
| 6 | " 31, " | A. J. Whitney | 62.00 |
| 7 | " 31, " | H. A. Moore | 279.00 |
| 8 | " 31, " | D. H. Sullivan | 54.25 |
| 9 | " 31, " | S. F. Cady | 54.25 |
| 10 | " 31, " | H. M. Benson | 248.00 |
| 12 | Aug. 31, " | J. D. King | 100.00 |
| 13 | " 31, " | F. M. Clark | 62.00 |
| 14 | " 31, " | Geo. D. Cook | 62.00 |
| 15 | " 31, " | F. W. McCulley | 62.00 |
| 16 | " 31, " | A. J. Whitney | 62.00 |
| 17 | " 31, " | H. A. Moore | 279.00 |
| 18 | " 31, " | D. H. Sullivan | 54.25 |
| 19 | " 31, " | S. F. Cady | 54.25 |
| 20 | " 31, " | H. M. Benson | 248.00 |
| 22—A | Sept. 8, " | A. Fetters | 7.85 |
| 22—B | " 30, " | J. D. King | 100.00 |
| [6] | | | |
| 23 | Sept. 30, 1908 | F. M. Clark | \$ 60.00 |

| No. | Date. | Payee. | Amount. |
|-----|------------|----------------|---------|
| 23 | " 30, " | F. M. Clark | 60.00 |
| 24 | " 30, " | Geo. D. Cook | 60.00 |
| 25 | " 30, " | F. W. McCulley | 60.00 |
| 26 | " 30, " | A. J. Whitney | 60.00 |
| 27 | " 30, " | H. A. Moore | 270.00 |
| 28 | " 30, " | D. H. Sullivan | 52.50 |
| 29 | " 30, " | S. F. Cady | 52.50 |
| 30 | " 30, " | H. M. Benson | 240.00 |
| 1 | Oct. 31, " | J. D. King | 100.00 |
| 2 | " 31, " | F. M. Clark | 62.00 |
| 3 | " 31, " | H. A. Moore | 279.00 |
| 4 | " 31, " | Geo. D. Cook | 62.00 |
| 5 | " 31, " | F. W. McCulley | 62.00 |
| 6 | " 31, " | A. J. Whitney | 62.00 |
| 7 | " 31, " | H. M. Benson | 248.00 |
| 8 | " 31, " | (Blank) | 54.25 |
| 9 | " 31, " | S. F. Cady | 54.25 |
| 11 | Nov. 30, " | J. D. King | 100.00 |
| 12 | " 30, " | F. M. Clark | 60.00 |
| 13 | " 30, " | Geo. D. Cook | 60.00 |
| 14 | " 30, " | F. W. McCulley | 60.00 |
| 15 | " 30, " | A. J. Whitney | 60.00 |
| 16 | " 30, " | H. A. Moore | 270.00 |
| 17 | " 30, " | D. H. Sullivan | 52.50 |
| 18 | " 30, " | S. F. Cady | 52.50 |
| 19 | " 30, " | H. M. Benson | 240.00 |
| 21 | Dec. 31, " | J. D. King | 100.00 |
| 22 | " 31, " | F. M. Clark | 62.00 |
| 23 | " 31, " | Geo. D. Cook | 62.00 |
| 24 | " 31, " | F. W. McCulley | 62.00 |
| 25 | " 31, " | A. J. Whitney | 62.00 |

United States of America.

9

| No. | Date. | Payee. | Amount. |
|------------|---------------|------------------|----------|
| 26 | " 31, " | D. H. Sullivan | 54.25 |
| 27 | " 31, " | S. F. Cady | 54.25 |
| 28 | " 31, " | T. E. Lynch | 24.50 |
| 29 | " 31, " | Claude J. Perret | 24.50 |
| [7] | | | |
| 30 | Dec. 31, 1908 | H. M. Benson | \$276.00 |
| 31 | " 31, " | H. A. Moore | 279.00 |
| 1 | Jan. 5, 1909 | J. D. King | 12.90 |
| 2 | " 5, " | F. M. Clark | 8.00 |
| 3 | " 8, " | Geo. D. Cook | 16.00 |
| 4 | " 8, " | F. W. McCulley | 16.00 |
| 5 | " 8, " | A. J. Whitney | 16.00 |
| 6 | " 8, " | D. H. Sullivan | 14.00 |
| 7 | " 8, " | S. F. Cady | 14.00 |
| 8 | " 8, " | H. M. Benson | 48.00 |
| 9 | " 8, " | H. A. Moore | 72.00 |
| 14 | Mar. 31, 1909 | J. D. King | 35.48 |
| 15 | " 31, " | F. M. Clark | 22.00 |
| 16 | " 31, " | Geo. D. Cook | 18.00 |
| 17 | " 31, " | F. W. McCulley | 18.00 |
| 18 | " 31, " | A. J. Whitney | 18.00 |
| 19 | " 31, " | Joe Mikel | 14.00 |
| 20 | " 31, " | E. M. Bassett | 14.00 |
| 21 | " 31, " | Geo. K. Cooper | 14.00 |
| 22 | " 31, " | Chas. Paine | 14.00 |
| 23 | " 31, " | H. M. Benson | 82.50 |
| 24 | " 31, " | A. C. Junkin | 72.00 |
| 1 | Apr. 30, " | J. D. King | 100.00 |
| 2 | " 30, " | F. M. Clark | 60.00 |
| 3 | " 30, " | Geo. D. Cook | 60.00 |
| 4 | " 30, " | F. W. McCulley | 60.00 |

10 *The National Bank of Commerce vs.*

| No. | Date. | Payee. | Amount. |
|-----|-----------|----------------|---------|
| 5 | " 30, " | A. J. Whitney | 60.00 |
| 6 | " 30, " | Joe Mikel | 52.50 |
| 7 | " 30, " | E. M. Bassett | 52.50 |
| 8 | " 30, " | Geo. K. Cooper | 52.50 |
| 9 | " 30, " | Chas. Paine | 52.50 |
| 10 | " 30, " | A. C. Junkin | 270.00 |
| 11 | " 30, " | H. M. Benson | 300.00 |
| 13 | May 31, " | J. D. King | 100.00 |
| 14 | " 31, " | F. M. Clark | 62.00 |

[8]

| | | | |
|----|--------------|----------------|----------|
| 15 | May 31, 1909 | Geo. D. Cook | \$ 62.00 |
| 16 | " 31, " | F. W. McCulley | 62.00 |
| 17 | " 31, " | A. J. Whitney | 62.00 |
| 18 | " 31, " | Joe Mikel | 54.25 |
| 19 | " 31, " | E. M. Bassett | 54.25 |
| 20 | " 31, " | Geo. K. Cooper | 54.25 |
| 21 | " 31, " | Chas. Paine | 54.25 |
| 22 | " 31, " | A. C. Junkin | 279.00 |
| 23 | " 31, " | H. M. Benson | 310.00 |
| 25 | June 30, " | J. D. King | 100.00 |
| 26 | " 30, " | F. M. Clark | 60.00 |
| 27 | " 30, " | Geo. D. Cook | 60.00 |
| 28 | " 30, " | F. W. McCulley | 60.00 |
| 29 | " 30, " | A. J. Whitney | 60.00 |
| 30 | " 30, " | Joe Mikel | 52.50 |
| 31 | " 30, " | E. M. Bassett | 52.50 |
| 32 | " 30, " | Geo. K. Cooper | 52.50 |
| 33 | " 30, " | Chas. Paine | 52.50 |
| 34 | " 30, " | H. M. Benson | 300.00 |
| 35 | " 30, " | A. C. Junkin | 270.00 |
| 1 | July 31, " | J. D. King | 100.00 |

United States of America.

11

| No. | Date. | Payee. | Amount. |
|-----|------------|----------------|---------|
| 2 | " 31, " | F. M. Clark | 62.00 |
| 3 | " 31, " | Geo. D. Cook | 62.00 |
| 4 | " 31, " | F. W. McCulley | 62.00 |
| 5 | " 31, " | A. J. Whitney | 62.00 |
| 6 | " 31, " | Joe Mikel | 54.25 |
| 7 | " 31, " | E. M. Bassett | 54.25 |
| 8 | " 31, " | Geo. K. Cooper | 54.25 |
| 9 | " 31, " | Chas. Paine | 54.25 |
| 10 | " 31, " | A. C. Junkin | 279.00 |
| 11 | " 31, " | H. M. Benson | 310.00 |
| 13 | Aug. 31, " | J. D. King | 100.00 |
| 14 | " 31, " | F. M. Clark | 62.00 |
| 15 | " 31, " | Geo. D. Cook | 62.00 |
| 16 | " 31, " | F. W. McCulley | 62.00 |

[9]

| | | | |
|----|---------------|----------------|----------|
| 17 | Aug. 31, 1909 | A. J. Whitney | \$ 62.00 |
| 18 | " 31, " | Joe Mikel | 54.25 |
| 19 | " 31, " | E. M. Bassett | 54.25 |
| 20 | " 31, " | Geo. K. Cooper | 54.25 |
| 21 | " 31, " | Chas. Paine | 54.25 |
| 22 | " 31, " | A. C. Junkin | 279.00 |
| 23 | " 31, " | H. M. Benson | 310 |

[Indorsed]: Complaint. Filed U. S. Circuit Court, Western District of Washington. Dec. 22, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy. **[10]**

*United States Circuit Court, Western District of
Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

Answer.

Comes now the defendant in the above-entitled action and answering the complaint of the plaintiff, for cause of answer says:

I.

Defendant admits the allegations contained in paragraph one of the complaint.

II.

Answering the second paragraph of the complaint, this defendant admits that during the years 1907, 1908 and 1909 [11] one P. M. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said period plaintiff deposited with the defendant large sums of money to the credit of said P. M. McCoy, and denies each and every other allegation in said paragraph contained and each and every part thereof.

III.

Answering the third paragraph of the complaint this defendant admits that said deposits were made

with this defendant, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

IV.

Answering the fourth paragraph of the complaint this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the complaint this defendant admits that it paid certain checks drawn by the said McCoy against said deposits of the plaintiff and charged the respective amounts thereof against the deposits of the plaintiff, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

VI.

Answering the sixth paragraph of the complaint this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VII.

Answering the seventh paragraph of the complaint this defendant says that it has neither knowledge nor information [12] sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VIII.

Answering the eighth paragraph of the complaint this defendant admits that on the 5th of March, 1910, the plaintiff demanded of and from the defendant payment of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), and denies each and every other allegation in said paragraph contained and each and every part thereof.

IX.

Answering the ninth paragraph of the complaint this defendant admits that it refused and still refuses to make the payment of said amount or any part thereof.

X.

Answering the tenth paragraph of the complaint this defendant denies the same and each and every part thereof, and denies that there is now due and owing to the plaintiff from the defendant on said account the sum of \$15,129.81, or any other sum or sums whatsoever.

For a further and first affirmative defense to said complaint this defendant alleges:

I.

That during the years 1907, 1908 and 1909 the plaintiff deposited with the defendant various and considerable sums of money to the credit of one M. P. McCoy, as Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States, with instructions to pay checks drawn against said deposits by the said M. P. McCoy as such Examiner and Special Disbursing Agent; that at the end of each month the account so created in

favor of the said McCoy was regularly balanced by the defendant and the vouchers returned to the plaintiff and a statement of account was rendered both to the said McCoy and to said plaintiff [13] monthly during the entire time that the plaintiff carried said account in favor of the said McCoy with this defendant. That the plaintiff did not, within sixty days after the return to the plaintiff of the checks drawn by the said McCoy against said account, notify the defendant that the checks so paid were forgeries. That by reason of such failure to so notify the defendant of said forgeries within sixty days after the return of the paid checks, the plaintiff is barred and estopped from maintaining this action.

For a further and second affirmative defense to plaintiff's complaint this defendant alleges:

I.

That the deposits so made by the plaintiff with this defendant in favor of the said M. P. McCoy, as such Examiner and Special Disbursing Agent, were made in the usual and customary manner, as deposits are generally, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay checks drawn by the said McCoy against such deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks, and that all

checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said M. P. McCoy, as such Examiner and Special Disbursing Agent, and that monthly statements were rendered to the plaintiff and to the said McCoy, showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any [14] checks by reason of forgeries or otherwise, until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of the said McCoy and upon the rendition of statements of his account, to have examined the said account and to have promptly notified the defendant of the alleged forgeries, if any there were, and that by reason of plaintiff's failure to so notify the defendant of such forgeries within a reasonable time after the said checks were paid, the said plaintiff is barred and estopped of any right it may have had to maintain this action for the recovery of the money prayed for in the complaint.

WHEREFORE, defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

Ralph S. Stacey, being first duly sworn, upon oath deposes and says: That he is Second Vice-president of the National Bank of Commerce of Seattle, the defendant in the above-entitled action; that he has read the within and foregoing answer, knows the contents thereof, and that the same is true, as he verily believes.

RALPH S. STACEY.

Subscribed and sworn to before me this, the 11th day of February, A. D. 1911.

[Seal]

J. N. IVEY,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within answer received and due service of same acknowledged this 11th day of February, 1911.

ELMER E. TODD,

W. G. McLAREN,

Attorneys for Plaintiff.

[Indorsed]: Answer. Filed U. S. Circuit Court,
Western District of Washington. Feb. 11, 1911.
Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.
[15]

*United States Circuit Court, Western District of
Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

Demurrer.

I.

Comes now the above-named plaintiff and demurs to the first affirmative defense of the defendant herein, for the reason and upon the grounds that said affirmative defense does not state facts sufficient to constitute a defense to said action.

II.

And plaintiff demurs to defendant's second affirmative defense, for the reason and upon the grounds that said defense does not state facts sufficient to constitute any defense to said action.

ELMER E. TODD,

United States Attorney.

W. G. McLAREN,

Assistant United States Attorney.

Received a copy of the within demurrer this 23d day of Feb., 1911.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Demurrer. Filed U. S. Circuit Court, Western District of Washington. Feb. 23, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy. [16]

United States Circuit Court, Western District of Washington, Northern Division.

1933.

Filed Sept. 21, 1911.

UNITED STATES OF AMERICA

vs.

NATIONAL BANK OF COMMERCE.

Oral Decision on Demurrer to Affirmative Defenses.

The United States prosecutes this action to recover a sum of money, being the aggregate amount of numerous checks issued by a disbursing agent against a deposit account subject to his checks in the defendant bank, which is an authorized depository of Government money. A series of frauds was practiced by issuing checks payable to the order of fictitious payees, these were endorsed by the disbursing agent using the fictitious names, other banks then received and cashed them and passed them on to the defendant, and by that method the disbursing agent obtained and misappropriated the money.

The defendant pleads as a defense that during the period of time in which the checks were issued and paid, it regularly rendered monthly statements of account to the Government and with each statement

returned the checks which had been paid during the preceding month, and that by failing to report the bad checks with business promptness, the action is barred by laches. The answer contains two separate affirmative defenses but they are alike, except that, the first one alleges that the Government failed to report the bad checks within a period of sixty days. The demurrer is aimed at both of these defenses.

If these checks came to the defendant bank through other banks the defendant became obligated, by business rules and bank rules, to promptly report any ground for rejecting the checks, or for reclaiming the amounts paid thereon. I doubt very much whether it would have recourse at this time against the banks from whom the checks were received, even if the [17] Government should prevail in the action. The right to reclaim is probably barred by the lapse of time. There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses resulting from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured, before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obligated to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the

genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. Therefore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender of his checks that the bank has paid, according to the rule of honesty and fair dealing, the depositor becomes bound to look at the returns and report any error promptly. The rule between individuals having mutual running accounts is that, an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant [18] as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the Government to examine these returns and report errors in time, was a cause of the

successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the Government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common-law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The Court sustains the demurrer to the first affirmative defense and overrules it as to the second.

C. H. HANFORD,
United States District Judge.

[Indorsed]: Oral Decision on Demurrer to Affirmative Defenses. Filed U. S. Circuit Court, Western District of Washington. Sept. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.
[19]

*In the Circuit Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

**Order [Sustaining Demurrer to First Affirmative
Defense, etc.].**

The above-entitled cause having come on for hearing in open court on the 18th day of September, 1911, on the demurrer of the plaintiff to each of the two separate affirmative defenses of the defendant herein, plaintiff appearing by Elmer E. Todd, United States Attorney, and W. G. McLaren, Assistant United States Attorney, and defendant appearing by Kerr and McCord, its attorneys, and the Court having heard the argument of counsel thereon, and being in all things fully advised;

It is hereby ordered that the demurrer of the plaintiff to the first affirmative defense of the defendant, be, and the same is hereby sustained;

To which action of the Court the defendant then and there excepted, which exception is hereby allowed.

It is further ordered that the demurrer of the plaintiff to the second affirmative defense of the de-

fendant be, and the same is hereby overruled;

To which action of the Court the plaintiff then and there excepted, which exception is hereby allowed.

Done in open court this 21st day of September, 1911.

C. H. HANFORD,
Judge.

[Indorsed]: Order. Filed U. S. Circuit Court Western District of Washington. Sept. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.
[20]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE OF
SEATTLE, a Corporation,

Defendant.

Amended Answer.

Comes now the defendant in the above-entitled action and filing its amended answer to the complaint of the plaintiff, for cause of answer, says:

I.

Defendant admits the allegations contained in paragraph one of the complaint.

II.

Answering the second paragraph of the complaint,

this defendant admits that during the years 1907, 1908 and 1909, one P. M. McCoy, was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said period plaintiff deposited with the defendant large sums of money to the credit of said P. M. McCoy, and denies each and every other allegation in said paragraph contained and each and every part thereof.

III.

Answering the third paragraph of the complaint, this defendant admits that said deposits were made with this defendant, but denies each and every other allegation in said paragraph contained and each and every part thereof.

IV.

Answering the fourth paragraph of the complaint, this defendant says that it has neither knowledge nor information [21] sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the complaint, this defendant admits that it paid certain checks drawn by the said McCoy against said deposits of the plaintiff and charged the respective amounts thereof against the deposits of the plaintiff, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

VI.

Answering the sixth paragraph of the complaint,

this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VII.

Answering the seventh paragraph of the complaint, this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

VIII.

Answering the eighth paragraph of the complaint, this defendant admits that on the 5th of March, 1910, the plaintiff demanded of and from the defendant payment of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), and denies each and every other allegation in said paragraph contained and each and every part thereof.

IX.

Answering the ninth paragraph of the complaint, this defendant admits that it refused and still refuses to make the payment of said amount or any part thereof. [22]

X.

Answering the tenth paragraph of the complaint, this defendant denies the same and each and every part thereof, and denies that there is now due and owing to the plaintiff from the defendant the sum of \$15,129.81, or any other sum or sums whatsoever.

And for a further and first affirmative defense to

the complaint, this defendant alleges:

1. That the deposits so made by the plaintiff with the defendant in favor of P. M. McCoy, as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Special Examiner and Disbursing Agent, and that monthly statements were rendered to the plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise, until the 5th day of March, 1910. That it was the duty of plaintiff upon the return of the vouchers of said McCoy and upon the rendition of

statements of his account, to have examined said account and to [23] have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had promptly been made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy, the defendant is precluded from asserting any claim that it may have had against the various banks which forwarded the checks in question to the defendant for payment, and that by reason of plaintiff's failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

For a further and second affirmative defense to the

complaint, this defendant alleges:

1. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy, as Special Examiner of Surveys, was authorized to make and pay on behalf of the United States. [24]

WHEREFORE defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Amended Answer. Filed in the U. S. District Court, Western District of Washington. Mar. 12, 1912. A. W. Engle, Clerk. By S., Deputy. [25]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

Reply to Amended Answer.

Comes now the plaintiff and for its reply to the

first affirmative defense in defendant's amended answer herein, denies each and every allegation therein contained.

II.

Replying to the second affirmative defense, plaintiff denies that the money sued for in this action, or any part thereof, was expended and used in payment of claims against the United States or at all.

ELMER E. TODD,

United States Attorney.

W. G. McLAREN,

Assistant United States Attorney.

Received a copy of the within Reply this 12th day of March, 1912.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Reply to amended Answer. Filed U. S. District Court, Western District of Washington. Mar. 13, 1912. A. W. Engle, Clerk. By S., Deputy. [26]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

Judgment.

This cause came on for trial on the 19th day of May, 1914, before the above-entitled court and a jury duly empaneled and sworn to try said cause, and evidence having been introduced both on behalf of the plaintiff and on behalf of the defendant, upon the motion of the plaintiff on the second day of the trial, to wit, May 20, 1914, the Court instructed the jury to return a verdict in favor of the plaintiff in the sum of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), together with interest thereon from the 5th day of March, 1910, at the rate of six per cent per annum, and said verdict was accordingly returned by the jury; wherefore, by virtue of the aforesaid premises;

IT IS ORDERED, ADJUDGED AND DECREED, That the plaintiff have and recover from the defendant the sum of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (15,-129.81), together with interest thereon from the 5th day of March, 1910, at the rate of six per cent per annum, or Three Thousand Eight Hundred Thirty-two and 88/100 Dollars (\$3,832.88) making a total of Eighteen Thousand Nine Hundred and Sixty-two and 69/100 Dollars (\$18,962.69), together with its costs and disbursements herein.

To the above judgment and each and every part thereof the defendant prays an exception, which is allowed. [27]

Dated this 25th day of May, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western District of Washington. May 25th, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [28]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

**Stipulation [Extending Time to June 25, 1914, to
Prepare, etc., Bill of Exceptions].**

It is hereby stipulated by and between the parties hereto, by their respective attorneys of record herein, that the defendant may have thirty days from the 26th day of May, A. D. 1914, in which to prepare and settle its Bill of Exceptions herein.

Seattle, Washington, May 26, 1914.

CLAY ALLEN,

Attorney for Plaintiff.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Stipulation for Extension of Time. Filed in the U. S. District Court, Western District of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [29]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

**Order Extending Time to June 26, 1914, for Filing
Bill of Exceptions.**

Upon motion of Messrs. Kerr & McCord, attorneys for the defendant and pursuant to the written stipulation of the parties hereto now on file herein, providing for an extension of time to the defendant for signing, allowing and filing its Bill of Exceptions herein, the Court having considered the same, and cause being shown therefor, it is hereby

ORDERED: That the time for the preparation, signing, allowance and filing of the Bill of Exceptions of the above-named defendant in the above-entitled case is hereby extended for a period of thirty (30) days from and after May 26th, 1914.

Dated this 20th day of May, 1914.

JEREMIAH NETERER,

Judge.

O. K.—ALLEN,

U. S. Attorney.

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. May 27th,

1914. Frank L. Crosby, Clerk. By E. M. Lakin,
Deputy. [30]

*In the United States District Court for the Western
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE,

Defendant.

**Stipulation [Extending Time to July 18, 1914, to
Prepare, etc., Bill of Exceptions].**

It is hereby stipulated by and between the parties
hereto that the time for preparing, serving and filing
the Bill of Exceptions in the above-entitled cause
shall be extended until July 18, 1914.

Dated June 22d, 1914.

G. P. FISHBURNE,

Attorney for Plaintiff.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Stipulation. Filed in the United
States District Court, Western District of Washing-
ton. June 22, 1914. Frank L. Crosby, Clerk. [31]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE,

Defendant.

**Order [Extending Time to July 18, 1914, to Prepare,
etc., Bill of Exceptions].**

This cause coming on to be heard upon motion of defendant for an extension of time within which to prepare, file and serve its Bill of Exceptions and upon stipulation of parties hereto;

It is by the Court ordered that the defendant shall have until July 18, A. D. 1914, within which to prepare, file and serve its Bill of Exceptions in the above-entitled cause.

Done in open court this 22d day of June, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order. Filed in the United States District Court, Western District of Washington. June 22, 1914. Frank L. Crosby, Clerk. By
———, Deputy. [32]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1933—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That heretofore, on, to wit, the 19th day of May, 1914, the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable Jeremiah Neterer, District Judge, sitting with a jury, the plaintiff appearing by G. P. Fishburne, Esq., Assistant United States District Attorney, the defendant appearing by E. S. McCord, Esq., of Kerr & McCord, its attorneys and counsel, a jury having been duly impaneled and sworn to try the cause, and counsel for plaintiff having made his opening statement to the jury, counsel for defendant reserving his opening statement; thereupon the following proceedings were had and done, to wit:

[Testimony of M. P. McCoy, for Plaintiff.]

M. P. McCOY, a witness on behalf of the plaintiff, being first duly sworn, on oath deposes and says as follows: [33]

Direct Examination.

(By Mr. FISHBURNE.)

Q. Your name is M. P. McCoy, is it?

(Testimony of M. P. McCoy.)

A. Yes, sir.

Q. You were formerly in the Government service?

A. Yes, sir, as examiner of surveys for the General Land Office.

Q. What was your official title?

A. Examiner of Surveys and Special Disbursing Agent.

Mr. FISHBURNE.—“Disbursing Agent” that should be, Mr. McCord.

Q. Where were your headquarters?

A. Seattle.

Q. During what period of time did you occupy such position?

A. From 1900 until about two years ago.

Q. About November, 1909. A. Yes, sir.

Q. You held that position continuously during that time? A. Yes, sir.

Q. What other important position, if any, did you hold prior to that period?

A. I was a member of the Geological Survey for the Interior Department.

Q. For about how long?

A. For about ten years before that.

Q. What were your duties as Examiner of Surveys and Special Disbursing Agent,—what was the nature of your work?

A. The public lands are surveyed by contract, by deputy surveyors, and my business was to inspect their surveys in the field after their finishing their work,—checking it up, in other words, to see if it was correct. [34]

(Testimony of M. P. McCoy.)

Q. About how wide a territory did your duties cover?

A. Well, I was in the States of Washington, Oregon, Idaho and Montana.

Q. And you say your headquarters were at Seattle? A. Yes, sir.

Q. What was it necessary for you to do, Mr. McCoy, in order to go around examining these public,—these surveys of public lands,—what did you have to do?

A. To inspect the surveys in the field, which necessitated transportation and assistance and subsistence for the assistants.

Q. You were authorized by the Government to employ men for that purpose? [35]

A. And to incur all these expenses.

Q. Were some of these surveys made in the State of Washington? A. Yes, sir.

Q. Where, for instance?

A. Well, throughout the State.

Q. You got your instructions from Washington, D. C.? A. Yes, sir.

Q. Were these instructions given to you for each particular survey, or were they in the nature of general instructions which you were to follow out?

A. There were general instructions and sometimes special instructions.

Q. Under the general instructions, did you have your own option as to the order in which you took up the examination of the different surveys?

A. Yes, sir.

(Testimony of M. P. McCoy.)

Q. What arrangement was made relative to the payment of the bills that you might incur under your authority for the performance of your duties?

(By Mr. McCORD.)

Q. Were these instructions in writing?

A. Yes, sir.

(By Mr. FISHBURNE.)

Q. What became of these instructions, Mr. McCoy?

A. I burned them something like two years ago, when this trouble began, I burned all my field-notes and note-books and all things of that kind. I had a trunk full and I burned them.

Q. Can you give us, briefly, the arrangements you had with the Government, whereby this money was to be paid for labor, or for services, or material, which you might incur?

Mr. McCORD.—I object as that is not the best evidence and no proper foundation has been laid for the introduction of secondary evidence.

Mr. McCORD.—I object to that.

The COURT.—I overrule the objection. [36]

Q. I will ask you this question, Mr. McCoy—from where did you get your instructions regarding the payment of this money?

A. From the Commissioner of the General Land Office.

Q. Were they oral, or in writing? A. Written.

Q. These written instructions, you still have them?

A. No, sir.

Q. What became of them? A. I burned them.

(Testimony of M. P. McCoy.)

Q. I will ask you what your instructions were, as to how you were to pay these men?

Mr. McCORD.—I object, as it is not the best evidence; asking for the contents of a written instrument; there is not shown any reason why the originals cannot be produced. The best evidence would be the files in the Land Office at Washington, or a copy of them.

Mr. McCORD.—I make that objection, your Honor.

Mr. FISHBURNE.—The testimony shows the originals were burned, your Honor. I think any secondary evidence is competent.

(Discussion.)

The COURT.—The next best evidence to the originals would be an examined or approved copy. I will sustain this objection.

Mr. FISHBURNE.—Allow us an exception.

The COURT.—Exception allowed.

Q. How were you to pay them?

A. I was to pay them as disbursing agent.

Q. I mean by check or by cash?

A. Well laterly I paid everything—I guess during this period in dispute, I guess, I paid everything by check.

Q. On what banks were your checks drawn?

A. The National Bank of Commerce of Seattle.

Q. You had an account there?

Mr. McCORD.—I move to strike out the testimony as not [37] responsive to the question, he asked

(Testimony of M. P. McCoy.)

how he was instructed to do and he answered how he did it.

Mr. McCORD.—I waive that, he answered yes.

A. Yes, sir, I had an account with the National Bank of Commerce as Special Disbursing Agent.

Q. You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

Mr. McCORD.—I object to that question, your Honor, for the same reason. That is a conclusion as to whether he drew it in accordance with his instructions. The instructions would be the best evidence.

The COURT.—I overrule the objection. He may testify as to what he did.

Mr. McCORD.—I ask an exception.

The COURT.—Exception allowed.

Q. You drew on that account, in accordance with your instructions, for the payment of bills and expenses? A. Yes, sir.

Q. Now, Mr. McCoy, I will ask you to examine this bundle of checks, which I hand you, and state whether, or not, they were issued by you while you were in the employ of the Government.

A. Yes, sir.

Q. On each check that is your signature, M. P. McCoy, Examiner of Surveys and S. P. A.?

A. Yes, sir.

Q. Sp. A.? Special Disbursing Agent?

A. Yes, sir.

Q. Mr. McCoy, what is the meaning of the marginal notation, Voucher Number 6, or Voucher num-

(Testimony of M. P. McCoy.)

ber so and so, on the check, what does that refer to?

A. In making my quarterly statement, or rendering my quarterly account to the General Land Office, I submitted a voucher for each check, up until along about in September, or October, or November, 1909.

Q. 1908 you mean, Mr. McCoy? [38]

A. Yes, sir, it was in 1908, from that time on I used a new form of pay-roll that covered the pay-roll expenses, but I still used the voucher plan for sustenance and transportation.

Q. And supplies? A. Yes, sir.

Q. Examine these checks again, Mr. McCoy, are the names of the payees real or fictitious persons in each instance? A. Fictitious.

Q. That is, there were no such persons?

A. No, sir.

Q. Does this apply to each of them to whom these checks were made out? A. Yes, sir.

Q. Examine the endorsements on the back, Mr. McCoy, and state whose individual endorsement is on the back of these checks, if you know. A. I do.

Q. Are these endorsements, one or more on each check, are these the endorsements of real persons or fictitious persons? A. Fictitious persons.

Q. Did the Government receive any services, or supplies or anything of value in exchange for these checks?

Mr. McCORD.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. McCORD.—Exception.

(Testimony of M. P. McCoy.)

The COURT.—Exception allowed.

A. No, sir.

Q. Did you receive the money on these checks, in each instance? A. Yes, sir.

Q. For the amount of the check? A. Yes, sir.

Q. So far as the appearance of these checks go, Mr. McCoy, are they made out in the same form and in the same manner [39] as you made out checks to real persons for real services rendered?

A. They are.

Q. That is, they are apparently regular on their face, are they not? A. Yes, sir.

Q. I believe I asked you if you made the endorsements on the back yourself? A. Yes, sir.

Q. Take, for instance, the first check, October 14, 1907, number one, payable to Albert Peterson, you had no such person as Albert Peterson rendering services at that time? A. No, sir.

Q. You endorsed it Albert Peterson and J. D. King? A. Yes, sir.

Q. And that way you received the money yourself?

A. Yes, sir.

Q. That statement of fact is true of each check?

A. Yes, sir.

Mr. FISHBURNE.—I offer in evidence this bundle of checks, as Plaintiff's Exhibit "A."

Mr. McCORD.—I object as incompetent, irrelevant and immaterial and the instruments not properly identified.

The COURT.—The objection is overruled.

Mr. McCORD.—Exception, your Honor.

(Testimony of M. P. McCoy.)

The COURT.—Exception allowed.

Checks referred to admitted in evidence and marked Plaintiff's Exhibit "A."

Mr. FISHBURNE.—At this time, Mr. McCord, I would like to submit the checks to the jurors, so that they may follow the testimony.

(Addressing the jury and exhibiting checks to the jury.)

These are the checks that have just been testified to. They are not quite in the order they were. If you will kindly keep them as they are. Each month is separated into a smaller package by itself. The voucher number that was referred to [40] in Mr. McCoy's testimony you will find in the upper left hand corner. Just pass those among you, will you, please?

(The jury examined checks embraced in Plaintiff's Exhibit "A.")

Q. You got these bank checks from the National Bank of Commerce when you opened up your account? A. Yes, sir.

Q. Did the cancelled checks come back to you, Mr. McCoy, or were they sent by the bank to the Department? A. They did not come back to me.

Q. Now while you were—during the period that is covered by these checks, you were doing some actual work for the Government, were you not, in the performance of your duties? A. Yes, sir.

Q. How often were you required to send in reports to the department in Washington? A. Weekly.

Q. Did you send in weekly reports during this

(Testimony of M. P. McCoy.)

period covered by these checks in evidence?

A. Yes, sir.

Q. I believe you testified that these checks, so far as appearance goes, are the same as real checks issued to real persons by you? A. Yes, sir.

Q. Now, you spoke, a moment ago, Mr. McCoy, about a voucher system that was prevalent between you and the Department. I will ask you now to take this bundle of vouchers and examine them, these for the—marked for the month of October, 1907. I will take voucher number six as an example. This purports to be signed by Albert Peterson, for services rendered of the amount of twenty dollars, from October 5th, 1907, to October 14, 1907, and down below that is the signature of M. P. McCoy approving the same—is that a genuine or fraudulent voucher?

A. Fraudulent.

Q. You signed the name Albert Peterson? [41]

Q. Then you approved it, with your own signature, as actually rendered to the Government for services?

A. Yes, sir.

Q. Now, will you go through the list of vouchers I hand you, for the month of October, 1907, and state whether or not they correspond with the voucher number noted on the margin of the checks for that same month—you have checked over these vouchers for the various months covered by the fraudulent checks shown as Exhibit "A"? A. Yes, sir.

Q. These vouchers are the vouchers referred to on the margin of the checks? A. Yes, sir, they are.

Q. How often did you send these vouchers to the

(Testimony of M. P. McCoy.)

Department? A. Quarterly.

A. Every three months? A. Yes, sir.

Q. I now hand you another document, certificate for the month of October, 1907, is that your signature, M. P. McCoy, Examiner of Surveys?

A. Yes, sir.

Q. That refers, does it not, to the individual vouchers that you have just examined for that month? A. Yes, sir.

Q. That is a statement that you sent in as a part, or a summary of the quarterly account?

A. Yes, sir.

Mr. FISHBURNE.—I now offer in evidence, as Plaintiff's Exhibit "B" the vouchers just testified to by the witness as having been sent in by him, quarterly, to the Department at Washington, D. C., for the following months; October, 1907;

Mr. McCORD.—And so on. I object to each of them as incompetent, irrelevant and immaterial and for the further reason that they show, in the light of the witness' testimony that they are all fraudulent.
[42]

Mr. FISHBURNE.—If the Court please, the very basis of this suit is that the checks were fraudulent and as a circumstance tending to rebut any evidence of negligence on the part of the Department at Washington, we purpose to show by those vouchers that they were apparently regular, that they complied in every respect with the departmental regulations, practice and custom, that there was nothing so far as the conduct of M. P. McCoy's accounts, contents of

(Testimony of M. P. McCoy.)

his accounts and reports and vouchers, to indicate to the Department of the United States that the fraud was being perpetrated at the time.

Mr. McCORD.—I don't think it makes any difference, your Honor. I think it is wholly immaterial, irrelevant and incompetent whether he sent any vouchers or whether he didn't. The question is the liability on this check.

The COURT.—I will sustain the objection at the present. If the evidence is necessary you may offer it again in rebuttal.

Mr. FISHBURNE.—I would like to make a suggestion while the matter is fresh in your Honor's mind. That is this: The defendant sets up in one of its affirmative defenses that if the Government had been as careful as it should have been in checking up his work it would have detected this fraud at once, or at least after the first report was sent in. Now, the very purpose of this is to rebut that identical charge. If those reports were regular in every respect, then there was nothing to put us upon our guard or notice. The Court will allow us an exception.

The COURT.—I will allow an exception. If the evidence is material at all, it is material in rebuttal of the defendant's defense.

Mr. FISHBURNE.—Very well.

Q. Mr. McCoy, state whether, or not, it is true that these vouchers, just introduced in evidence, were in accordance with the usual and regular method of handing in vouchers that was in use between you and

(Testimony of M. P. McCoy.)

the Department at the time that they were sent in.

[43]

Mr. McCORD.—I make the same objection to that, your Honor.

Mr. FISHBURNE.—It may be stricken out by consent.

Q. Is there anything in the—you say that, along about October, 1908, the Department changed this system of vouchers?

Mr. McCORD.—What do you mean by that?

Mr. FISHBURNE.—It just means that instead of the voucher plan, it was done by pay-rolls system.

Mr. McCORD.—What date was that made?

Mr. FISHBURNE.—October 8, 1908.

Q. Examine these vouchers for October, 1908, and see if that was the new or the old system that was employed—

Mr. McCORD.—I make the same objection to that, your Honor. It is referring to the vouchers which were not admitted in evidence.

The COURT.—Objection sustained.

Mr. FISHBURNE.—I ask an exception.

The COURT.—Exception allowed.

Mr. McCORD.—These same questions I suppose will all go out there, won't they, Mr. McLaren?

Mr. FISHBURNE.—I am just checking it down to each point. You better ask the question each time and have the Court's ruling on it.

Q. That is for sustenance? A. Yes, sir.

Q. You retained the individual voucher system for supplies and material? A. Yes, sir.

(Testimony of M. P. McCoy.)

Q. How is it, Mr. McCoy, that no vouchers are found for the last two months' issue of fraudulent checks, that is, the months of July and August, 1909—did you ever send in any vouchers for those two months?

The COURT.—I will sustain the objection.

Q. It is true, is it not, that the vouchers that you sent in [44] for all of the other months were apparently regular and were in the usual form and manner?

The COURT.—Objection sustained.

Mr. McCORD.—Q. When were you arrested?

A. September, 1909, about September 1st.

Q. You say, Mr. McCoy, that you sent in statements to the Department quarterly, will you examine these—referring, Mr. McCoy, to the voucher for October, 1908, and the other vouchers covered by the fraudulent period, whom did you say these vouchers were sent to?

A. To the Commissioner of the General Land Office.

Q. And were sent quarterly? A. Quarterly.

Q. Now, will you explain, Mr. McCoy, what these accounts are, which I hand you, and which are signed by M. P. McCoy, special disbursement account?

A. That is an account current for the quarter.

Q. Covering the period from October 1st, 1907, to September 31st, 1907? A. Yes, sir.

Mr. FISHBURNE.—Mr. McCord, that should be December 31st, the quarter commencing October 1st.

Mr. McCORD.—It is September here.

(Testimony of M. P. McCoy.)

Q. When you sent these quarterly account current in which you say you did quarterly, did you, or did you not, transmit with them the individual vouchers covering that same period? A. Yes, sir.

Q. Take the next one, from January 1st, 1908, to March 31st, 1908, is that your signature?

A. Yes, sir.

Q. The same is true as to that? A. Yes, sir.

Q. The same is true as to all the vouchers down to a certain point? A. Yes, sir. [45]

Q. Now, calling your attention to the account current from July 1st, 1908, to September 30th, 1908.

A. It is not true of that one. That is not the same thing I had in mind.

Q. Take up the one, running from October 1st, to December 31st, 1908, and examine the leaflets on the inside, the outline of expenditures, the first item, October 31st, is the pay-roll—that was the pay-roll system? A. Yes, sir.

Q. Now, examine all of these quarterly accounts current, which I hand you, they are all signed by yourself, are they not, as special disbursing agent?

A. Yes, sir.

Q. These were sent in by you quarterly?

A. Yes, sir.

Q. And, so far as their form is concerned, they were in due and proper form as was the customary practice of the Department? A. Yes, sir.

Q. Did these vouchers for expenditures, and also the pay-roll vouchers referred to in each of these accounts current, include these fraudulent checks,

(Testimony of M. P. McCoy.)

Exhibit "A"? A. Yes, sir.

Mr. McCORD.—Do you want to offer those?

Mr. FISHBURNE.—Yes, I offer in evidence now as Plaintiff's Exhibit "C" the quarterly accounts current as follows: October 1st, 1907, to December 31st, 1907; January 1st, 1908, to March 31st, 1908; April 1st to June 30th, 1908; and so on down to June 30th, 1909.

Mr. McCORD.—I object to them as incompetent, irrelevant and immaterial.

Mr. FISHBURNE.—The Court, I presume, will make the same preliminary ruling?

The COURT.—The same ruling.

Mr. FISHBURNE.—Allow us an exception.

The COURT.—Exception allowed. [46]

Q. Mr. McCoy, you sent in no quarterly account for the period after June 30th, did you? A. No, sir.

Q. The quarterly account was not yet due at the time you were arrested, is that the reason?

A. Yes, sir.

Q. Is there anything on the face of these quarterly accounts, or upon the individual vouchers or pay-rolls vouchers that indicates any irregularity, or that indicates the practice, or I should say the fraudulent practice or scheme that you were carrying on?

Mr. McCORD.—I object to that as calling for the conclusion of the witness, that being the very thing that the jury is to pass upon, and I object on the further ground that it is incompetent, irrelevant and immaterial, and not the best evidence.

Mr. FISHBURNE.—It raises practically the same

(Testimony of M. P. McCoy.)

question, your Honor, as to the regularity of the reports he was sending in.

The COURT.—Objection overruled. I will sustain that.

Mr. FISHBURNE.—Beg your Honor's pardon.

The COURT.—I will sustain the objection.

Mr. FISHBURNE.—I ask an exception.

The COURT.—Exception allowed.

Q. State what that paper is.

A. An account current.

Q. For the period ending when?

A. September 30th, 1907.

Q. Beginning July 1st, 1907? A. Yes, sir.

Q. Any fraudulent items included in that account current? A. There were.

Q. None of them covered by these checks—I will change the form of that question—is that the usual form for the quarterly account that was in use?

A. Yes, sir. [47]

Q. Can you tell, from an examination of it, whether or not any of these items were improperly allowed?

A. Not from an examination of this alone, I would have to have the checks that correspond and then I could tell.

Mr. FISHBURNE.—I offer Plaintiff's Exhibit "D," a quarterly account.

Mr. McCORD.—I object to it as incompetent, irrelevant and immaterial and not properly identified.

Mr. FISHBURNE.—That is offered, your Honor,

(Testimony of M. P. McCoy.)

for the purpose of comparison of the regular quarterly account that the witness was sending in with the fraudulent one covered by those checks.

The COURT.—I will sustain the objection.

Mr. FISHBURNE.—I ask an exception.

The COURT.—Exception allowed.

Q. You are living in Spokane, Mr. McCoy?

A. Yes, sir, I am.

Cross-examination.

(By Mr. McCORD.)

Q. How long did you say that you occupied the position of examiner of surveys and special disbursing agent?

A. I had the position of examiner of surveys for about nine years, and during four or five years of that time I was special disbursing agent.

Q. Prior to the time that you became special disbursing agent, who attended to that duty of disbursing?

A. I did the disbursing. I paid the expenses of the men and rendered my account to the General Land Office and was reimbursed by check from the Interior Department.

Q. Who advised you in the first instance?

A. The Department advised me in the first instance, of what was necessary.

Q. You advanced your own money?

A. Yes, sir.

Q. After that time you adopted the system—

(Testimony of M. P. McCoy.)

Mr. FISHBURNE.—You don't mean that he adopted the system, the office adopted the system, of course.

Q. After you became disbursing agent and also examiner of surveys, I will ask you where you maintained your office, if you had one?

A. I had no office.

Q. You attended to the surveys in Washington, Idaho and Montana? A. Yes, sir.

Q. Did the Government have any other agent, or assistant but you in the transaction of this business? A. No, sir.

Q. Did they have any other person, or individual or agent upon the ground to assist you in doing this work, or to check your accounts?

A. Do you mean, now, assistants who I employed myself?

Q. Employed by the Government.

A. Well, they were employed by me for the Government.

Q. Who did you employ?

A. My assistants in the field?

Q. Yes, sir.

A. Well, I supposed—I employed assistants to assist me in making the examination of the surveys.

Q. Did the Government employ any other men to aid you? A. No, sir.

Q. In checking your accounts as special disbursing agent—did the Government check your accounts?

A. The Department have special distributing agents—their usual custom.

(Testimony of M. P. McCoy.)

Q. They sent men to Seattle to examine them or do it at Washington?

A. At the General Land Office at Washington.

Q. Were *they out* here, at any time, by anybody?

A. Not that I am aware of.

Q. How did they detect your fraudulent scheme?

[49]

A. Mr. Good, I forget his initials, a special agent of the land office, discovered it there in Montana.

Q. You were not checked up in your field work, or in your agents' work by anybody until shortly before you were arrested during the whole period of time that you were in the service of the Government, is that right? A. That is right.

Q. How many surveys did you attend to—about, in a general way, about how much money did you expend legitimately in the service of the Government between 1900 and 1909?

Mr. FISHBURNE.—I object to that as incompetent, irrelevant and immaterial and also as calling for a conclusion of the witness.

The COURT.—The objection is overruled.

A. I don't remember.

Q. Give it to me approximately.

A. Without looking up the records, I could not say.

Q. In the year 1900, when you went to work for the Government in the capacity of examiner of surveys, until the time of your arrest in 1909, state approximately how much money you expended legitimately for the Government, how much per year

(Testimony of M. P. McCoy.)

would you estimate it.

Mr. FISHBURNE.—I make the same objection.

The COURT.—The objection is overruled.

Mr. FISHBURNE.—I ask an exception to each of those rulings.

The COURT.—Exception allowed.

A. Well, I could not approximate it without looking over my—

Q. Well, about how much business were you doing—you can tell about how much you would do in a year—I am not trying to trap you into anything.

A. If I could give you an approximate statement, I would gladly do so, but without going over the records, I don't see how I could do so.

Q. As much as five thousand dollars? [50]

A. No, sir.

Q. One half of that, twenty-five hundred dollars?

A. No, sir, nothing like that.

Q. One thousand a year, would you say?

A. The very outside limit would be one thousand dollars, I should say.

Q. At any time, did the Government send any one else, so far as you know, to check up your work and see whether this money had been legitimately expended? A. No, sir.

Q. You have misunderstood the question, Mr. McCoy, have you not?

A. It is only a surmise on my part, but I think there was a survey over in the extreme northeast part of Montana, over which several claimants were in litigation, and I think possibly that it was reported

(Testimony of M. P. McCoy.)

that I had not been on the ground to make my examination.

Q. What did this work consist of, examining of surveys?

A. The Government has public lands throughout these states and they make surveys of them.

Q. This is done by United States Deputy Surveyors? A. Yes, sir.

Q. For the Government? A. Yes, sir.

Q. What did you do?

A. Before the Government would accept it, I was sent into the field to make an examination of the survey, whether it was in acceptable form, whether it was correctly done.

Q. Did you go out and run the lines over and resurvey it?

A. I was to approximate ten per cent of the lines run by the party.

Q. As much as ten per cent? A. Yes, sir.

Q. You were supposed to hire assistants to do that? A. Yes, sir.

Q. Surveyors? [51] A. Yes, sir.

Q. Now, Mr. McCoy, you have identified a bunch of checks here, Plaintiff's Exhibit "A," how do you know that these checks are the ones that you issued fraudulently—how can you tell?

A. By recognizing my handwriting.

Q. Every one is a different one, is it not?

A. Yes, sir.

Q. And each individual check has a different signature—do you mean to tell me that, from an exam-

(Testimony of M. P. McCoy.)

ination of these checks that you can tell which ones you forged and which ones the signatures are legal?

Mr. FISHBURNE.—I object to the question as assuming that there is a different payee for each check, which is not the case. There were only twenty-nine different payees in the checks, your Honor, but the checks themselves number over approximately a hundred.

Mr. McCORD.—I think the question is a proper question, your Honor, to show how he got at this.

Mr. FISHBURNE.—I withdraw the objection.

A. I identify these from my own signatures on the check.

Q. When did you do that?

A. At the time the check was issued.

Q. When this list—when these checks were selected out, did you select them? A. No, sir.

Q. Who did? A. I couldn't tell you.

Q. Did you go over the various checks that had been returned, with any body in Washington and assist him in picking the forged checks, that is, those that you forged? A. No, sir.

Q. You did not? A. No, sir.

Q. You have only made a cursory examination of these checks to-day, have you not? [52]

A. Yes, sir.

Q. You have not taken up each one individually and gone through them? A. Yes, sir, each check.

Q. Have you examined the signature on each one?

A. Yes, sir.

Q. I would just like to have you tell me how you

(Testimony of M. P. McCoy.)

can remember five years after each one of these was taken which are genuine and which are not.

A. Well, I know that, during the time that these were issued, that I issued nothing but fraudulent checks.

Q. Did you issue, at any time during the period from 1907 to 1909, anything but fraudulent checks—you don't mean that?

A. None except those that were payable to myself.

Q. From 1907 to 1909 you did nothing then—you did not issue a single check that was valid?

A. Except those to myself.

Q. Except the two hundred and seventy dollars a month. A. Yes, sir, my salary.

Q. Everything else was fraudulent?

A. Yes, sir.

Q. You did no work?

A. I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.

Q. How much did you pay out in that way?

A. I am unable to state.

Q. About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?

A. I don't think I could even approximate it.

Q. Would you say that you had expended five thousand, one third of that? A. No, sir.

Q. About four thousand dollars?

A. About a couple of thousand dollars. [53]

Q. You have no way of arriving at that estimate?

(Testimony of M. P. McCoy.)

A. No, sir, I have no records.

Q. You think that you have spent about a couple of thousand, or it may be more?

A. It may be more or it may be less.

Q. It may have been as high as five thousand dollars?

A. I don't think it was as high as five thousand.

Q. As much as four thousand?

A. I don't think it was over a couple of thousand.

Q. What were you doing—you say that you paid some men for services rendered, and that you paid it out of your own money—do you know of any of the men that you paid it to? A. No, sir, I do not.

Q. Can't you recall any of them? A. No, sir.

Q. What work did they do for which you paid them?

A. Some were chainmen and some were flagmen and some were teamsters and some of them were stage drivers and some of them livery-stable people.

Q. You did go over onto the different surveys, during the period from 1907 to 1909, to September, 1909, you did carry on the checking of these surveys?

A. Only a part of them. I did a few of them.

Q. You were on all of them, were you not, with the exception of the one in northern Montana?

A. No, sir.

Q. How many all together?

A. I am unable to approximate. The records of the office will show, and I could not even approximate without having those records.

Q. You made up reports on these various surveys

(Testimony of M. P. McCoy.)

and sent them in to the Government? A. Yes, sir.

Q. These reports showed that you had run the lines on at least ten per cent of the surveys, the deputy surveyor's work? A. Yes, sir. [54]

Q. Is that right? A. Yes, sir.

Q. You mean to be understood that you did run ten per cent? A. Yes, sir.

Q. On some you did not run quite ten per cent?

A. I only mean to approximate it.

Q. You actually did the work of about ten per cent of the most of them? A. No, sir, on a few of them.

Q. On others you did part of the work and certified that you did it all. A. Yes, sir.

Q. On all of them, with the exception of in northern Montana, you did some work? A. No, sir.

Q. What others?

A. Well, in quite a majority I did not examine in the field at all.

Q. Didn't do any field work at all? A. No, sir.

Q. You had nobody do it? A. No, sir.

Q. You cannot tell now a single man who worked for you, that you paid, between 1907 and 1909?

A. No, sir, not a single man.

Q. Not a single man? A. No, sir.

Q. Where did you keep this money, at Seattle?

A. No, sir, on the ground. That is, wherever I happened to be making examinations of surveys.

Q. What sort of a report would you send in with the vouchers, would you draw a plat showing the survey?

(Testimony of M. P. McCoy.)

A. No, sir, I would send in the field-notes covering the ground. [55]

Q. You would send in the field-notes you had gotten from the deputy surveyor's work?

A. I didn't get them from the deputy surveyor, I got them from the Surveyor General's Office.

Q. You used the same notes in sending them in?

A. Yes, sir.

Q. If you had done the work individually, they would not have checked with the work in the Surveyor General's Office, would they—if you had made these surveys and run your own lines, it would not have checked correctly with the work in the Surveyor General's Office, would it? A. No, sir.

Q. In checking, did you simply try to run over the lines made by the deputy surveyor on the ground and find his monuments? A. Yes, sir.

Q. And during this time, a period of two years, you simply copied the notes from the Surveyor General's Office?

A. They were not copied, they were faked, we made our—

Q. They were taken from the Surveyor General's Office?

A. The only data we had was taken from the Surveyor General's Office.

Q. They were reproductions of his notes?

A. No, sir.

Q. You went to the Surveyor General's Office and copied them? A. Yes, sir.

Q. Copied them as they were shown in his office?

(Testimony of M. P. McCoy.)

A. No, sir; but I would not send in notes unless they would correspond in a general way.

Q. You would modify them in some way?

A. Yes, sir.

Q. Well, now, then, how did you do when you actually rerun the lines, did you try to make changes in them?

A. No, I would return the conditions as I found them. I [56] would take my own field-notes and my reports would be exact copies of my own field-notes.

Q. Wherever you found the monuments made by the surveyor, in those cases the notes would be identical, but in those notes that you faked from the notes in the Surveyor General's Office—

A. So far as the monuments and as to the topography, they were not the same.

Q. When you faked the notes you were not the same?

A. It is seldom that any two men write up the same notes after going over a certain line.

Q. Now, then, these checks that you draw, where did you cash them, Mr. McCoy?

A. At different places around over the country.

Q. Tell me how you would do it, take the first check for Albert Peterson, for twenty dollars—

A. May I see the check, please?

(Exhibit "A" shown witness.)

Q. The one on the top there, the back of the check shows—

Mr. FISHBURNE.—For the benefit of the jury,

(Testimony of M. P. McCoy.)

the check referred to now is October, 1907, the first one.

A. That I cashed it through the National Bank, or the Columbia Valley Bank of Wenatchee.

Q. Did you take it there yourself? A. No, sir.

Q. How did you arrange that?

A. I sent these checks to this bank, under the name of J. D. King.

Mr. FISHBURNE.—You mean this particular check, you didn't send all of them?

A. This particular check.

Q. J. D. King, who was he?

A. A fictitious name, the same as the rest. I sent these checks to the Columbia Valley Bank in the name of J. D. King.

Q. By mail? A. Yes, sir. [57]

Q. From where?

A. From the points, I don't remember now.

Q. Did the bank send these checks—

A. I opened up an account with the bank and sent these checks for collection.

Q. You opened up an account in the first place?

A. On this particular check as J. D. King.

Q. Did you go there to open it?

A. No, sir, by mail. I sent these checks by mail in the first place.

Q. You opened an account by mail? A. Yes, sir.

Q. Then you checked it out in the same name?

A. Yes, sir.

Q. You forged the name of King to these checks?

A. Yes, sir.

(Testimony of M. P. McCoy.)

Q. How did you get the money—how did they send it to you?

A. Then this was checked out in my favor by this man J. D. King, this fictitious King.

Q. You cashed the checks in that way and sent to you by mail? A. Yes, sir.

Q. Were you ever in the Seattle National Bank?

A. Yes, sir.

Q. Do you remember of any checks paid by them?

A. Yes, sir.

Q. How did you manage that?

A. Under the name of F. M. Clark.

Q. Did you open an account under that name?

A. Yes, sir.

Q. You went in personally? A. Yes, sir.

Q. You would go in there and deposit them yourself? A. Yes, sir.

Q. From time to time? [58] A. Yes, sir.

Q. And then check them out? A. Yes, sir.

Q. How about the Mutual National Bank, how did you manage that?

Mr. McCORD.—Montana National Bank it means, I suppose.

Mr. FISHBURNE.—Yes.

A. That was done by mail, under another name.

Q. Where from?

A. From some part of Montana, wherever I happened to be. I was at different points in Montana.

Q. Would you send more than one check at a time?

A. Yes, sir. I would generally send the bunch for the month.

(Testimony of M. P. McCoy.)

Q. And have them placed to your account?

A. Yes, sir; to the account of these fictitious names.

Q. King? A. Yes, sir, or Clark.

Q. Did you have more than one fictitious name?

A. Yes, sir; the first was J. D. King.

Q. How many accounts did you have with the various banks—you had one under the name of J. D. King and one Clark, and what else?

A. That is all.

Q. And this was done under these two names?

A. Yes, sir; as I remember.

Q. Then you would forge the name of King on the check and make it payable to your order?

A. Yes, sir.

Q. You didn't go and draw the money yourself?

A. No, sir. It was sent by draft to me at Seattle, and I would check it out from wherever I would happen to be.

Q. When did you open the account with the National Bank of Commerce, or did you open it? [59]

A. The National Bank of Commerce, I opened an account there when they adopted this disbursing agent system.

Q. Did you have the opening of the account yourself, or was it done from Washington?

A. The deposit was made there from Washington, and I was notified of the fact.

Q. The deposit was made from Washington?

A. To my credit.

Q. As M. P. McCoy, Special Disbursing Agent?

(Testimony of M. P. McCoy.)

A. Yes, sir.

Q. This was how the account was opened up?

A. Yes, sir.

Q. You were directed to go there and leave your signature? A. Yes, sir.

Q. You went there and left your signature?

A. Yes, sir.

Q. And you drew your money out of that account for various purposes connected with the Government? A. Yes, sir.

Q. Some that were legitimate, and some that were not, that is right, is it not?

A. I checked that money out through other banks.

Q. What—

A. That is on checks cashed in other banks.

Q. You drew checks?

A. Yes, sir, and cashed the checks.

Q. Every one of these checks contains your genuine signature? A. Yes, sir.

Q. And all of these in this bunch, to the best of your knowledge, are fictitious? A. Yes, sir.

Q. Is there anything on the face of these checks to advise or indicate the fact that there was anything fraudulent about them, was there? [60]

Mr. FISHBURNE.—Which bank, the National Bank of Commerce?

A. No, sir; they are regular in every way.

Q. The contents and endorsements are what the law required to be put upon them?

Mr. FISHBURNE.—I object to that as calling for a conclusion of the witness.

(Testimony of M. P. McCoy.)

The COURT.—I sustain the objection.

Q. That is on all of them? A. Yes, sir.

Q. Did you put the—I notice some of them have a voucher, number one voucher from the 6th to the 16th; you showed these vouchers to the bank, did you?

A. No, sir; these vouchers were sent with my quarterly report to the land office at Washington.

Q. You put in these all of the pay-rolls and sustenance and so on—I notice that some of them, or at least I thought some of them had no—did not have vouchers on them?

A. The last ones, several of them, are there not?

Q. Some of these in April—in August, 1909, examine these for August, 1909, did you put notations’—

Mr. McCORD.—I withdraw that question.

Q. Did you exhibit your pay-rolls to the bank?

Mr. McCORD.—It is on the next page.

A. No, sir.

Q. I see these checks, one bunch of them seems to have been paid direct, or part of these checks, take, for instance, the one for one hundred dollars, to J. D. King, the check is dated August 31, 1909, for one hundred dollars, number 13, and August 31, 1909, for sixty-two dollars, in fact all of these for August, with the exception of one or two seem to have been drawn direct without the intervention of any other bank, were they not?

A. No, sir, these were paid through the Seattle National Bank and are stamped indistinctly on the

(Testimony of M. P. McCoy.)

back of them there.

Q. They were paid through the Seattle National Bank? [61] A. Yes, sir.

Q. Now, you referred to your instructions a while ago, from the Government, they authorized you, when this deposit was put there to sign checks for this money in drawing it out, did it not?

Mr. FISHBURNE.—I object to that question as calling for a conclusion of the witness and not the best evidence as to whether the letter of instructions authorized him to sign these checks.

(Discussion.)

The COURT.—I will overrule the objection.

A. Yes, sir.

Q. You had authority from them to draw checks?

A. Yes, sir.

Q. You showed that authority to the bank, I presume, you must have, did you not?

A. Yes, sir, I showed my letter of instructions to Mr. Maxwell, who was at that time cashier of the bank.

Q. And these instructions that you got, you just exhibited them to him, did you not? A. Yes, sir.

Q. You didn't give him any other instructions?

A. No, sir.

Q. Just let him read your instructions?

A. Yes, sir.

Q. The bank had no other instructions, except from reading your letter?

A. I don't know, but I presume—

(Testimony of M. P. McCoy.)

Q. I don't want any of your presumptions—you don't know?

A. I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q. No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you? A. No, sir.

Q. There were no conditions, it had been remitted direct to [62] the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A. Yes, sir, the purport of them.

Q. That is the substance?

A. I don't remember the wording exactly, but that is the substance or object of the letter.

Q. To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

Mr. FISHBURNE.—I object to that as calling for a conclusion of the witness as to the authority contained in the letter.

The COURT.—I overrule the objection.

Mr. FISHBURNE.—Exception.

The COURT.—Exception allowed.

A. Yes, sir.

Q. Now, the bank, every month, rendered you a statement of your account, did it not?

A. Yes, sir.

Q. And the vouchers, or the checks that you had used were not returned to you? A. No, sir.

Q. A list of them was returned to you in a state-

(Testimony of M. P. McCoy.)

ment of account? A. Yes, sir.

Q. Also the vouchers themselves and a statement were sent to the Department at Washington by the bank—that is, the checks were sent to Washington?

A. I don't know.

Q. You don't know what the custom was?

A. I presume they were but I had no means of knowing.

Q. Your account was balanced up every month?

A. Every quarter, yes, sir.

Q. Every month? A. No, sir.

Q. Was it every quarter?

A. Every quarter. [63]

Q. The cancelled checks were sent to Washington—you understand that it is customary to send them to Washington? A. Yes, sir, I do now.

Q. These checks, so far as you know, were all sent to Washington at least every three months?

A. Yes, sir, I presume they were.

Q. So that your account was balanced up every month between you and the bank? A. Yes, sir.

Q. The bank rendered you a statement every month? A. Yes, sir.

Q. They didn't wait until the end of the quarter, but rendered it every month to you? A. Yes, sir.

Q. They didn't render any to the Department at Washington? A. I don't know, I am sure.

Q. Did the Government, prior to September, 1909, ever make any complaint or criticism of your acts or your dealings with the Government in regard to these examinations of surveys? A. No, sir.

(Testimony of M. P. McCoy.)

Q. They never offered any criticism at all of any kind?

A. Oh, once in a while there would be some item suspended for explanation, as for instance a telegram, a copy of which would have to be sent. Where I had failed to send a copy, or something like that, or some clerical error.

Q. As I understand it, you sent in until October, 1908, you sent in to the Department at Washington vouchers for everything that you expended?

A. Yes, sir.

Q. Purporting to be signed by the men who had done the work or furnished the supplies?

A. Yes, sir.

Q. That is true, is it not? A. Yes, sir. [64]

Q. These were sent in monthly, were they not?

A. Prior to the adoption of the Special Disbursing Agent, yes, sir.

Q. After the adoption of the Special Disbursing Agent scheme, they were sent how often?

A. Quarterly.

Q. When was the disbursing agency feature adopted?

A. I think after the first of October, 1908. That is when we began.

Q. After the account was opened up in the bank in your name as Special Disbursing Agent and as examiner of Surveys, from that time you sent in your vouchers quarterly? A. Yes, sir.

Q. And continued to do that until October, 1908, did you?

(Testimony of M. P. McCoy.)

A. I continued to do that until my arrest in 1909, September, 1909.

Q. You sent in the vouchers, as well as the pay-rolls?

A. No, sir, sent in the pay-rolls after we adopted that plan.

Q. October, 1908?

A. Yes, sir, prior to that time sent in vouchers.

Q. You continued to send in pay-rolls quarterly after October, 1908? A. Yes, sir.

Q. So that throughout the whole history of these transactions, from the time you opened the account in the Bank of Commerce, until you were arrested, you sent in, every three months, vouchers for every dollar you claim to have expended? A. Yes, sir.

Q. These vouchers were used until October, 1908?

A. Yes, sir.

Q. After October, 1908, the labor and services went in under the pay-roll? A. Yes, sir.

Q. You continued to have each member of the pay-roll sign that voucher? A. Yes, sir. [65]

Q. They signed the pay-roll, each member that you claimed pay for services?

A. They signed the pay-roll, yes, sir.

Q. Other services were on independent vouchers?

A. Yes, sir.

Q. That was up to the time of your arrest?

A. Yes, sir.

Q. The Government, at all times then, from 1907 up until the time of your arrest on September 1st, 1909, had these vouchers in its possession?

(Testimony of M. P. McCoy.)

A. Yes, sir.

Q. Now, the Government could, very easily, by sending men out to check up the ground work and field work have ascertained that you had never been over it, could they not? A. Yes, sir.

Q. And that is the way that they finally stumbled onto the illegal practice? A. Yes, sir.

Q. Or it was an easy matter, was it not, to have found out from the people in the vicinity that you had not done this work, was it not, Mr. McCoy?

A. Except in the sparsely settled districts.

Q. If they had made any investigation at all, or if they had enquired for any of these men you claim to have paid money to, they could have ascertained that the men could not have been produced?

A. Yes, sir.

Q. So that by the simplest sort of an investigation they could have found out that there were no such people in existence as those whose names you had given? A. Yes, sir.

Q. Did they ever inquire from you, as to the men who composed these accounts, as to their residence or postoffice address of any of these individuals to whom you claim to have paid money? [66]

A. I think each voucher shows the postoffice address of each man who signed the voucher.

Q. And all of these were fictitious and there was no such person at that place? A. No, sir.

Q. And a letter addressed to them would have been returned uncalled for? A. Yes, sir.

Q. I don't want to embarrass you, Mr. McCoy, but

(Testimony of M. P. McCoy.)

I want to ask you the question because I think it is necessary—when were you arrested and where?

A. It was about the first of September, 1909.

Q. Where were you arrested?

A. At the Lincoln Hotel at Seattle.

Q. With what offense were you charged?

A. The offense of embezzlement of Government funds.

Q. Of what particular embezzlement were you charged with? A. I don't remember.

Mr. FISHBURNE.—I will stipulate that he was indicted, arrested and sentenced for embezzlement covered by the checks shown in Exhibit "A."

Mr. McCORD.—You said you would produce the indictment.

Mr. FISHBURNE.—Do you want the indictment now?

Mr. McCORD.—No, you can put it in. The indictment will be introduced showing the charge against him.

A. Do you know what particular checks made up those you were arrested for embezzling on? What the particular funds were?

A. I don't remember. I was rather embarrassed at the time the indictment was read to me, and I don't remember.

Q. You were sentenced in Seattle?

A. In Tacoma.

Q. Were you tried? A. No. [67]

Q. You pleaded guilty to the indictment and you say that you don't know what was in it?

(Testimony of M. P. McCoy.)

A. No, sir, I don't remember now.

Q. You are now out on parole?

A. No, sir, I am at liberty, my parole expired on the 19th of last month.

Q. So you are completely freed?

A. Yes, sir.

Q. You are not pardoned? A. No, sir.

Q. So that your civil rights have not been restored? A. No, sir.

Q. Did you not make any application in person?

A. No, sir. I made an application for a parole and it was granted.

Q. Mr. McCoy, I will have to go into those a little more in detail, as I don't know how all of these different names here, that is the names of H. M. Benson, A. C. Jenkins, Charles Paine, George K. Cooper, E. M. Bassett, Joe Mikel, A. J. Whitney, F. W. McCulley, George D. Cook, F. M. Clark and J. D. King,"—

Mr. FISHBURNE.—Those are the names referred to in the checks—"all covering the month of August, 1909, I want you to tell me, if you can, how you can go through those and tell now, after the elapsing of five years, which ones of these signatures are fraudulent, and which are not, or that all of them are—I ask you whether you can do that from any independent examination of the signatures, as they now appear, or can you tell only because you were not doing any work during this period of time?

A. I could not identify these from these fictitious signatures, but I can identify them from my own

(Testimony of M. P. McCoy.)

signature having issued the checks.

Q. Well, your signature does not appear on any of those checks—that is the signature of M. P. McCoy, except as the drawer of the check? [68]

A. That is all.

Q. Can you independently say that all of these names placed on these checks and made by you, can you tell now from an examination of those signatures at this time—I don't see how it is possible—tell me whether if you didn't have these passed up to you, and without any other information, whether you could tell whether these were forgeries?

A. No, sir, it would be impossible for me to tell.

Q. If you saw the checks you could not tell that they were forgeries, except, as you say, between 1907 and 1909, you say that you did not issue any legitimate checks? A. Yes, sir.

Q. That is the only way you can tell?

A. Yes, sir.

Q. That is also true of the vouchers, is it not, you could not tell that these were forgeries on the vouchers from an inspection of the vouchers at this time?

A. Yes, sir.

Q. How?

A. Simply by knowing that they were fraudulent.

Q. I say by an examination of the voucher itself, independent of your personal knowledge, you could not tell, it would be an impossibility? A. No, sir.

Q. Now, Mr. McCoy, are you not mistaken in saying that, from 1907, the date of the first of these checks, October 14, 1907, to September 30, 1909, two

(Testimony of M. P. McCoy.)

years that you did not issue a single genuine check?

A. Not as against the National Bank of Commerce.

Q. How do you know that? You transacted business and had men in your employ, and were paying them from some source or other, now is it not possible that some of these checks that you drew were payable for a legitimate purpose and to the men who earned the money? A. No, sir.

Q. Why do you say that? [69]

A. Because whenever I incurred expenses in the field I paid it to the individuals themselves, and in order to carry this thing through I would issue checks against the National Bank of Commerce but only those that were fictitious.

Q. What work were you doing from October, 1907, to September 30, 1909, what particular surveys were you examining?

A. Surveys in the States of Washington, Idaho and Montana. The records would show the title of each survey that is to whom contracts were let, but who they were now, I cannot recollect.

Q. You are sure that you never drew any checks in their favor on the National Bank of Commerce?

A. I am sure of that.

Q. But you used the money that you got from the National Bank of Commerce in paying them?

A. Yes, sir, except those payable to myself.

Q. The money that you got on these fraudulent checks you used, in part, to pay these men?

A. Yes, sir.

Q. How much you have no means of knowing?

(Testimony of M. P. McCoy.)

A. No, sir.

Q. Otherwise that it is from one to four thousand dollars?

A. Yes, sir, somewhere within those sums.

Q. But you did render services to the Government, valuable services, during that period, did you not in examining these surveys? A. Yes, sir.

Q. And employed men to assist you in getting the information you did furnish the Government?

A. Yes, sir.

Q. And you did have men employed by you in examining surveys for the Government?

A. Yes, sir.

Q. I would like to—if you can give me some more correct information as to the amount of money you spent on each particular survey, the number of men you would employ and [70] I would like to have you try to recall, Mr. McCoy, about how much money you spent legitimately from 1907 to 1909, that you paid for out of funds that you carried in this bank.

Mr. FISHBURNE.—Q. Is it your testimony, Mr. McCoy, that the actual services which you did pay for during this period, were paid out of these fraudulent checks, or did you put in a personal check to pay for these services?

A. I got this money individually.

Q. Out of the proceeds of your personal checks?

A. I paid them with my own money.

Q. I want to get this clear—during the time that these fraudulent checks were sent in by you, you also sent in checks payable to yourself for different

(Testimony of M. P. McCoy.)

amounts, did you not? A. Yes, sir.

Q. Was it out of these checks, payable to yourself, that you paid the men that you had employed, or did you pay these men out of the proceeds of these fraudulent checks?

A. I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and over time and part of the money I got from the fraudulent checks.

Q. You kept all of this money in the bank?

A. Yes, sir.

Q. The National Bank of Commerce?

A. Yes, sir.

Q. When you got money from these fraudulent checks and legitimate money, you put them all together in one account? A. Yes, sir.

Q. Whether it was from one source or the other, part was from fraudulent sources and part from other sources? A. Yes, sir.

Q. You could not tell which? A. No, sir.

Q. You have no doubt but that you paid out from one to four thousand dollars for the Government in this way? A. Yes, sir. [71]

Q. Most of it came from the fraudulent checks, because there were more of them? A. Yes, sir.

Q. So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A. Well, the amount was so small that I was paying out, compared with what I was getting in, that

(Testimony of M. P. McCoy.)

I would not have any means of knowing where it did come from.

Q. It was all mixed together? A. Yes, sir.

Q. The money which you did use to pay these legitimate expenses and labor was money paid out of your own personal bank account into which you had put the money realized from these fraudulent checks?

A. Yes, sir.

Q. That is right, is it not? A. Yes, sir.

Q. Now, take, for instance, the surveys for the year 1907, can you tell where you examined one—just recollect one where you did any work on it?

A. Without having the records before me, I could not tell that.

Q. It is possible, is it not, that you have paid out more than four thousand dollars?

A. No, sir, I should not estimate it any higher than that.

Q. You think that four thousand is the maximum?

A. Yes, sir.

Q. Would you consider that approximately the sum?

A. I should say a couple of thousand. It might have been more or it might have been less.

Q. It might have been as much as four thousand.

A. It might have been over two thousand.

Q. The last one of these vouchers was sent on September 30, 1907: [72]

A. No, sir, the last one went in—

Q. June 30, 1909.

A. Yes, sir, June 30, 1909.

(Testimony of M. P. McCoy.)

Q. You didn't send in any after that?

A. No, sir.

Q. But you drew quite a number of checks after that, did you not?

A. Yes, sir, I drew checks at the end of July and to the end of August.

Q. Did you keep any account in any other bank than the National Bank of Commerce as Special Disbursing Agent? A. No, sir.

Q. Did the Government not receipt to you for these various accounts that you sent in?

A. No, sir, it was not their practice, but they did, however, at the end of the year send me a statement from the auditor of the interior department of my account and including the account for the past year.

Q. They verified your account at the end of 1907, did they? A. Yes, sir.

Q. And verified it at the end of 1908?

A. Yes, sir.

Q. Tell you it was correct?

A. Yes, sir, letters were sent me from the Auditor of the Interior—from the Auditor of the Treasurer of the Interior Department and sent me these statements, at the end of these periods, stating that my account had been examined and found correct, or that there were some slight discrepancies and that they needed correction, or something of that kind.

Q. What officer of the National Bank of Commerce, did you do your business with, Mr. Maxwell?

A. It was the young man who had charge of the disbursing of the Government funds in the rear of

(Testimony of M. P. McCoy.)

the office, I don't remember his name, in fact I never knew his name. He was one of the bank tellers.

Q. Ever do business with Mr. Backus? [73]

A. No, sir.

Q. Did you ever do business with Mr. Stacey?

A. No, sir.

Q. Did you ever do any business with Mr. Seewell?

A. No, sir.

Q. Mr. Maxwell, you did show him your credentials? A. Yes, sir.

Q. Did you turn your signature over as Special Disbursing Agent? A. Yes, sir.

Q. And your written instructions were to show your orders to the bank, were they?

A. I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q. You were authorized to draw it out on your signature?

Mr. FISHBURNE.—I object to that, your Honor, as calling for a legal conclusion of the witness.

(Discussion.)

The COURT.—I overrule the objection.

Mr. FISHBURNE.—Exception.

A. Yes, sir.

Q. You showed that to the bank? A. Yes, sir.

Q. You didn't tell them anything about your being unlimited in your power to draw that money?

A. No, sir, I simply showed them my letter.

Q. The letter didn't contain any limitations on your powers? A. No, sir.

Q. It was an unconditional authority?

(Testimony of M. P. McCoy.)

A. Yes, sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q. With that exception there was no limitation?

A. No, sir.

Q. There was no limitation on the authority of the bank to pay you money? [74]

Mr. FISHBURNE.—Same objection, your Honor.

The COURT.—Objection overruled.

Mr. FISHBURNE.—Exception.

The COURT.—Exception allowed.

A. No, sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q. It didn't say anything about it at all?

A. Well, I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q. You don't think that anything was stated as to any limitation at all?

A. I don't think that there was any limitation stated.

Q. When you say that you don't think that you could draw checks in favor of your own order, you are getting that from information other than that contained in the letter? A. Yes, sir.

Q. There was nothing in the contents of that letter that indicated that you could not draw it in your own favor?

A. No, sir, not that I can remember.

(Testimony of M. P. McCoy.)

Redirect Examination.

(By Mr. FISHBURNE.)

Q. When were you paroled out, Mr. McCoy?

A. March 15th, last.

Q. March 15, 1911? A. Yes, sir.

Q. You have been steadily employed in the city of Spokane for how long? A. Since June 15th.

Q. For what firm?

A. W. A. Richards, architects.

Mr. McCORD.—That ought to be Ritchie.

Mr. FISHBURNE.—Ritchie, yes.

Q. Since when? [75] A. June 15, 1911.

Q. You have never had any difficulty or trouble with the Government before this transaction of the fraudulent checks during all the time you worked?

A. I never had any trouble with anybody, the Government, or anybody else.

Q. Under your authority from the Government you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?

Mr. McCORD.—I object as incompetent, irrelevant and immaterial, and asking for an interpretation of a question of law by the witness.

Mr. FISHBURNE.—I think that is proper, your Honor, in view of the questions asked upon cross-examination.

Mr. McCORD.—(Reading:) “Under your authority from the Government, you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?” Now,

(Testimony of M. P. McCoy.)

that is the very question here, your Honor. I object to it as incompetent, irrelevant and immaterial and asking for a conclusion and asking for the interpretation of the contract, what his authority was.

The COURT.—I sustain the objection.

Mr. FISHBURNE.—An exception.

The COURT.—Exception allowed.

Mr. McCORD.—(Reading:) “When you told Mr. McCord that your letter of instructions”—

Mr. FISHBURNE.—That goes with the same ruling. Turn over to the next page.

Mr. McCORD.—The next page.

Mr. FISHBURNE.—Begin next at the second question on page 50.

Mr. McCORD.—The second question?

Mr. FISHBURNE.—Yes.

Q. During the time covered by these checks, you were not doing much of any work—were you doing anything in April, 1908, do you recollect being over at Great Falls, Montana? [76]

A. I don't remember anything specially.

Q. I hand you four vouchers, numbered fifteen, sixteen, seventeen and eighteen, commencing April, 1908, to J. D. King, A. M. Anderson, F. M. Clark and Fred Evans, state whether these were fraudulent.

A. Yes, sir.

Q. You received the money on these vouchers?

A. Yes, sir.

Mr. McCORD.—I make the same objection to that, if your Honor please. I object to it as irrelevant, incompetent and immaterial.

(Testimony of M. P. McCoy.)

Mr. FISHBURNE.—I offer in evidence now these vouchers, Plaintiff's Exhibit "E," being Nos. 15, 16, 17 and 18, upon this theory: it developed on cross-examination by Mr. McCord that there was a possibility, at least a theory that part of the proceeds of these fraudulent checks might have inured to the benefit of the Government in payment, as the witness testified, in cash to the men whom he had employed during the period covered by the checks. I now offer to show by these exhibits that in addition to monies received by him from the fraudulent checks, he handed in vouchers which I now offer in evidence, covering a portion of the same fictitious persons, Anderson, Clark, King and the rest of them. My position is clear. Counsel contends and will contend I presume from the line of cross-examination developed that even although the money was all obtained irregularly and fraudulently from the bank, yet if as a matter of fact he applied a part of that money to the payment of actual bills, that they are entitled to show that, as the Government would not be damaged by that appropriation of that money. Now, I am offering to prove by these exhibits that there were other monies which were used in payment of these actual expenses.

The COURT.—As at present advised, I will rule against you, Mr. Fishburne. If I should change my mind about it, I will let you introduce these. I don't think they are material in this case at all. [77]

Mr. FISHBURNE.—The Court will allow us an exception.

(Testimony of M. P. McCoy.)

The COURT.—Exception allowed.

Q. I hand you voucher for November, to yourself, for two hundred and seventy dollars—can you state whether or not you worked during that month of November, 1907?

Mr. McCORD.—I object to that as immaterial. They are offering that for the same reason I suppose, your Honor. He drew his own check, drawing two hundred and seventy dollars a month.

The COURT.—I will sustain the objection.

(Discussion.)

The COURT.—I will sustain the objection.

Mr. FISHBURNE.—Allow us an exception.

The COURT.—Exception allowed.

Mr. FISHBURNE.—Now, the same objection and the same ruling to the other voucher for December, I presume.

Mr. McCORD.—How far down is the next one, Mr. McLaren?

Mr. FISHBURNE.—I offer in evidence Plaintiff's Exhibit "F," being vouchers for the months of November and December, 1907, in favor of the witness.

Mr. McCORD.—Same objection.

The COURT.—Sustained.

Mr. FISHBURNE.—An exception.

The COURT.—Exception allowed.

Mr. McCORD.—Where do you want me to read now?

Mr. FISHBURNE.—I think the next question is open to question yet.

(Testimony of M. P. McCoy.)

Mr. McCORD.—All right. Which one is the next one?

Mr. FISHBURNE.—“Now, I hand you a certificate, signed by yourself”—on page 51, about the middle of the page.

Mr. McCORD.—Yes.

Q. Now, I hand you a certificate, signed by yourself, for the month of April, 1908, and I will ask you, if, on the first page of this, that is your signature “M. P. McCoy, Examiner of Surveys.” [78]

A. Yes, sir.

Q. Calling your attention to the item of disbursements, as shown by that itemized statement, and calling your further attention to page two, to a certain entry of expenditures, under date of April 8th. “To J. J. Carlton, Darby, Montana, for hire two horses and buggy, with driver, expenses, etc., eighteen dollars,” is that part of a voucher that you returned under that heading? A. It is.

Q. Calling your attention to the second portion, marked page three, under date of April 30th, 1908, “To J. D. King, Great Falls, Montana, for services as chainman, from April 19 to 30 inclusive, twelve days, twenty-four dollars.” Is that the same J. D. King the fictitious person? A. Yes, sir.

Q. To F. M. Clark, Great Falls, Montana, services as chainman, twelve days, two dollars, twenty-four dollars; is that the same fictitious person?

A. Yes, sir.

Q. Fred Evans, Conrad, Montana, for board and lodging assistants, J. D. King and F. M. Clark, John

(Testimony of M. P. McCoy.)

Howard, E. M. Roper and A. M. Anderson, forty-five dollars and six cents, those are the same fictitious persons? A. Yes, sir.

Q. Calling your attention to page two of this itemized statement, April 21st, "To J. L. Murray, Helena, Montana, for board and lodging assistants, J. D. King and F. M. Clark April 21, four dollars." Those are fictitious persons, are they?

A. Yes, sir.

Q. Ray Jones, Great Falls, Montana, for board and lodging assistants, J. D. King and F. M. Clark, April 22d, three dollars, that is fictitious, is it not?

A. Yes, sir.

Mr. FISHBURNE.—I offer in evidence now Plaintiff's Exhibit "G," being the certificate of Mr. McCoy during the month [79] of April, 1908, consisting of two separate parts, the substance of which has been referred to in the previous questions.

Mr. McCORD.—I have no objection to those two.

The COURT.—They may go in.

Certificate referred to admitted in evidence and marked Plaintiff's Exhibit "G."

Q. You testified a while ago that during this period covered by the fraudulent checks, you were doing some work, is that true? A. Yes, sir.

Q. That is on different surveys?

A. Yes, sir.

Q. You also testified that you had paid these men money, did you employ the cash which you received on your own checks?

A. Yes, sir, I paid them in cash.

(Testimony of M. P. McCoy.)

Q. You testified further that you thought that the cash might have been from the proceeds of these fraudulent checks?

A. Possibly, I mean, that is all.

Q. Is it not true, as shown by the statement in Exhibit "G," which I have just shown you, that you had also received other money which you were not entitled to and which you didn't earn which is not covered by these checks? A. Yes, sir.

Q. When you say that possibly some real services may have been paid out of these fraudulent checks, you don't know whether it is true or not?

A. Yes, sir, I know it was true.

Q. How much was there of it?

A. Well, I am unable to tell how much.

Q. How can you tell that it was not paid out of these fraudulent checks?

A. I cannot tell that it was out of these fraudulent checks, but it was out of my money.

Q. You cannot tell that it was not paid out of these fraudulent checks? [80]

A. No, sir, I paid it out of money that I obtained whether it was from my salary, per diem or from these I cannot say.

Q. Do you recall, Mr. McCoy, how the expenses covered by these vouchers, for April, 1908, were paid to these fictitious persons named in there—to refresh your recollection, I will call your attention to the month of April, 1908, as to the fraudulent checks in this case, do you recollect how they were paid?

A. That was done prior to my appointment as

(Testimony of M. P. McCoy.)

Special Disbursing Agent.

Q. In 1908, this is in April and the appointment was—

A. I don't understand why this—during part of this year I was addressed as special agent of the General Land Office, and I acted as special agent under instructions from the commissioner of the General Land Office, and during that time I was examining applications for surveys for different people around there over the different states in which I traveled and during that time I was acting as special agent and not as disbursing agent, and this month covers both, where I was acting as special agent and also as examiner of surveys.

Q. How about May, 1908? A. Yes, sir.

Q. How about March, 1908?

A. Yes, sir, the same way.

Q. I will call your attention to the itemized report for March, 1908, that is your signature M. P. McCoy, Examiner of Surveys? A. Yes, sir.

Q. Disbursements as shown by within itemized statement and vouchers, one hundred and seventy-five dollars and twenty cents, that is the amount of the items set forth on the inside pages, is it not?

A. Yes, sir.

Mr. McCORD.—I object to that, your Honor, as irrelevant, incompetent and immaterial and not the best evidence. The document itself your Honor ruled out. [81]

Mr. FISHBURNE.—I beg pardon.

Mr. McCORD.—It is the contents of an instrument

(Testimony of M. P. McCoy.)

that the court has already ruled would not be admitted.

The COURT.—I sustain the objection.

Mr. FISHBURNE.—Exception.

The COURT.—Exception allowed.

Q. Is it not true, Mr. McCoy, that all of the actual services which you did incur, during the period covered by the fraudulent checks, were as a matter of fact itemized in your various reports, sent in and paid by the Government's money, either to you or to the persons whom you had hired by checks outside of these fraudulent checks which you have before you? A. Yes, sir.

Q. Then it could not be possible, if this is correct, that you paid for any of the actual services rendered out of the fraudulent checks, that would not be possible?

A. It is possible in this way, that I had money obtained by fraud and also money obtained legitimately—

Q. Is it not also true that all the money that you obtained legitimately would be paid through vouchers and checks other than these fraudulent ones?

A. No, sir.

Q. Then why did you send in such a voucher as is shown on March, 1908, and also in April, 1908?

A. That is when I was acting as special agent for the General Land Office.

Q. Not disbursing any?

A. I was not disbursing anything, but I was paying my railroad expenses and hotel bills.

(Testimony of M. P. McCoy.)

Q. During these two months is it not true that you put in accounts for King and Clark—

A. That was during the latter part of the month, April when I was acting as examiner of surveys.

Q. I believe that you testified that you signed all of these vouchers and reports shown in exhibit "B," as M. P. McCoy, Examiner of Surveys? [82]

A. Yes, sir.

Q. Mr. McCoy in reference to your field-notes, which you say were faked, during the time that you were not actually doing the work, as I understand your testimony in answer to Mr. McCord, you modified the field-notes of the surveyor general so as to give them the appearance of being genuine?

A. Yes, sir.

Recross-examination.

(By Mr. McCORD.)

Q. You say that these vouchers which you refer to, Exhibit "G," covering the months of March and April, 1908, that then you were acting as special agent for the land department?

A. During part of the time.

Q. And in that case you rendered an account of the work you did and received the money for it, did you? A. That is the way I remember it.

Q. Well, now, then, how long did you act as special agent of the department approximately?

A. Well, during each spring, for a month or two.

Q. So that in 1908 and 1909 you were also acting as special agent?

A. Yes, sir. No, excuse me; in 1909 I am under

(Testimony of M. P. McCoy.)

the impression that I did not act as special agent.

Q. During this whole time you draw two hundred and seventy dollars a month, you were busy with Government work all the time yourself?

A. Yes, sir.

Q. Do you consider that you earned the two hundred and seventy dollars a month, yourself?

A. No, sir. I didn't when I was acting as special agent.

Q. Part of the time you say you were—you had men employed doing legitimate work making surveys during the time that you were entitled to your salary? A. Yes, sir.

Q. On most of them covering this early period, you yourself [83] were engaged, were you not in tending to the work you were having done, you said that you had quite a considerable work done in examining surveys and running lines and you were employed by the Government and you were receiving money from the Government at that time, were you not? A. Yes, sir.

Q. So that during most of your time you would consider that you were fairly entitled to the money that you drew, two hundred and seventy dollars per month?

A. No, sir, not during the last two years, I didn't consider that I did.

Q. They paid you your salary? A. Yes, sir.

Q. They never objected to paying it at any time, they never raised any question about paying you?

A. Yes, sir, small ones.

(Testimony of M. P. McCoy.)

Q. They never sued you to recover it back?

A. Not that I am aware of.

Q. How long a time, Mr. McCoy, did you spend in the penitentiary at McNiel's Island?

A. A year and a half.

Q. How long were you sentenced for?

A. Three years.

Q. You were paroled after about a year and a half? A. Yes, sir.

Redirect Examination.

(By Mr. FISHBURNE.)

Q. You have just testified, Mr. McCoy, that you received your salary during all of that period and that the Government didn't protest the payment of your salary—I presume that you refer to your monthly vouchers which are shown in Plaintiff's Exhibit "B"? A. Yes, sir.

Q. And which you have certified as being correct?

A. Yes, sir. [84]

Q. On these vouchers is the alleged residence of the fictitious persons in each case, the place where they were supposed to have been living at that time?

A. Yes, sir.

Q. You didn't do any work during the summer of 1909? A. No, sir.

Q. Did you ever do any work—

A. Except early in the spring.

Q. Can you tell approximately how many months' pay you had rendered services for during the period covered by the vouchers you sent in—I don't mean exactly but somewhere nearly?

(Testimony of M. P. McCoy.)

A. No, sir, I could not tell you that.

Q. Can you tell by consulting the names and addresses, Mr. McCoy?

A. No, sir, the only way I could tell it would be by having a list of the surveys, but I could not tell it from any information that I have here.

Q. Could you tell from the Great Falls, Montana— A. I was there mostly as special agent.

Q. During the period covered by these checks, however? A. Yes, sir.

Q. There were no checks between January, 1908, and May, 1908, during the spring while you were examining these surveys and not disbursing any?

A. No, sir.

Mr. FISHBURNE.—In view of the cross-examination developed by Mr. McCord, I now renew my offer in evidence of Exhibit “B,” being the vouchers that were sent in by the witness and concerning which Mr. McCord examined the witness freely upon cross-examination.

Mr. McCORD.—I object to it as incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

[Testimony of W. G. Good, for Plaintiff.]

W. G. GOOD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:
[85]

Direct Examination.

(By Mr. FISHBURNE.)

Q. Will you state your name to the Clerk, Mr. Good? A. W. A. Good.

(Testimony of W. G. Good.)

Q. W. G. Good; G-o-o-d? A. Yes, sir.

Q. What is your position with the Government service, Mr. Good?

A. Special agent of the General Land Office.

Q. How long have you held that position?

A. A little over seven years.

Q. How long have you been in the Government service all told, Mr. Good? A. Seven years.

Q. Approximately?

A. Seven years the first of February.

Q. Were you in that position in the summer and fall of 1909? A. I was.

Q. Are you familiar with the method and custom of the department at that time as to checking up the surveys of public lands that had been made by contract? If you are not, say so, and I will—

A. Wouldn't say that I am familiar with checking up surveys.

Q. No, I mean the method.

A. Yes, sir, in a way, yes, sir.

Q. Will you explain to the jury, Mr. Good, how the Government has its public lands surveyed in the State of Washington and adjoining States, and then how those surveys are checked up, if in any way.

Mr. McCORD.—Are you a surveyor? Have you ever been in the land department as a surveyor?

The WITNESS.—No, sir, I am not a surveyor.

Mr. McCORD.—I don't think the witness is qualified to testify. [86]

Mr. FISHBURNE.—I will qualify him.

Q. Are you familiar, Mr. Good, with the method

(Testimony of W. G. Good.)

and practice of the Department in making its surveys and checking them up?

A. Well, I am familiar with the method of letting contracts and the way they are checked up by the examiner of surveys, and so forth.

Q. That is what I mean.

A. Yes, sir, I know how that procedure is gone through with.

Q. Now, will you explain that procedure to the jury?

Mr. McCORD.—I object. The witness has not shown himself to have qualifications at all.

The COURT.—I will overrule the objection.

Mr. McCORD.—I object as incompetent, irrelevant and immaterial.

Q. Proceed, Mr. Good.

The COURT.—Well, I don't know how material it is in this case to go into that.

Mr. FISHBURNE.—I will withdraw that question for the present, then, if the Court please.

Q. Now, refreshing your recollection, Mr. Good, do you recollect anything about the transactions of one M. P. McCoy during the summer of 1909 while he was acting as special disbursing agent?

A. I do, yes, sir.

Q. State whether or not you made any investigation of charges of irregularities against him in his work with the Government? A. I did.

Q. What were those investigations, Mr. Good?

A. Why, I investigated his—I tried to investigate his work on the Colville Reservation here in 1909,

(Testimony of W. G. Good.)

the summer of 1909; also some work that he did in Montana in 1908 on different surveys that he was supposed to be checking up.

Q. To refresh your memory, Mr. Good, I will ask you to examine some of these checks which are marked Plaintiff's Exhibit [87] "A" and state whether or not you made any investigations to determine whether the payees in those checks or the names as shown as payees in those checks were fictitious or otherwise.

Mr. McCORD.—I object to that as incompetent, irrelevant and immaterial.

Mr. FISHBURNE.—I expect to prove by this witness that these persons were fictitious persons, the names were fictitious.

The COURT.—The objection is overruled.

Q. Did you make such investigation, Mr. Good?

A. I did as to the supposed employees working for Mr. McCoy during the year 1909 and 1908.

Q. Was that investigation made at the places where these parties' residences were supposed to be?

Mr. McCORD.—I object to that as leading, irrelevant, incompetent and immaterial.

Mr. FISHBURNE.—I will change the form of question, Mr. McCord. It doesn't make any difference.

Mr. McCORD.—I don't care about the leading part of it. I object to it as incompetent, irrelevant and immaterial.

Q. Did you find any such person as J. D. King?

A. I did not.

(Testimony of W. G. Good.)

Mr. McCORD.—Ask him where he examined or something of that kind. Such a question without stating where is too indefinite.

The COURT.—Well, he can't tell it all at once. He has got to have a beginning somewhere. I overrule the objection.

Mr. McCORD.—Exception.

The WITNESS.—In the first place, I called for the—on the Commissioner of the General Land Office for Mr. McCoy's monthly and quarterly statements of his accounts to ascertain the name—

Mr. McCORD.—What is that?

The WITNESS.—To ascertain the names of the people that he was supposed to have working for him.

Mr. McCORD.—I move to strike out that, your Honor, [88] as not the best evidence. He gathered certain information from certain public records in Washington.

Mr. FISHBURNE.—That is simply preliminary and leading up to the investigation.

The COURT.—Objection overruled. Motion to strike out denied.

Mr. McCORD.—Exception.

Q. Proceed, Mr. Good.

A. And those statements, those quarterly statements, also vouchers, set out the different men that he was supposed to have had working for him.

Mr. McCORD.—I move to strike out, your Honor, from the witness' testimony the statement as to what certain public records in Washington showed as not

(Testimony of W. G. Good.)

the best evidence.

Mr. FISHBURNE.—I have offered those same vouchers and counsel objected to them. I don't think it lies now with him to object as secondary evidence.

Mr. McCORD.—It is not secondary evidence.

The COURT.—The motion to strike out is denied. The objection is overruled.

Mr. McCORD.—The Court will allow me an exception.

The COURT.—Exception allowed.

Q. Proceed, Mr. Good.

A. And to secure the addresses of the different employees and in that way I had some grounds to work on to look up these people. This man King was supposed to be from Great Falls.

Mr. McCORD.—I move to strike out that, your Honor, where he was supposed to be from, as wholly immaterial, irrelevant and incompetent.

The COURT.—You need not repeat that every time. I will let you have a bill of exceptions and have it all in. I am going to let him testify about his whole investigation.

Mr. McCORD.—Understand I have an exception to all. I don't desire to impede the progress of the trial.

The COURT.—You may have your exception.
[89]

Q. Go ahead, Mr. Good.

A. Well, I found out the addresses of these different employees and the names of the employees as set

(Testimony of W. G. Good.)

out in Mr. McCoy's vouchers and checks and so forth, and I went to the different places where these different addresses were given to try to locate these different employees, different places in Montana, Great Falls, Benton, Culbertson, and Glasgow, I made a thorough search for these different employees and was unable to find any such men as set out in his accounts and his statement of expenditures and also as to the checks that were issued in payment for services and labor.

A JUROR.—Will you speak a little louder?

Mr. FISHBURNE.—The juror didn't get the last part of your answer. Will you repeat the last portion of your answer, that you didn't find any of the persons named?

A. Yes, sir, as set out in checks and vouchers that he rendered a statement—he rendered a statement every month of his expenditures and he set out in all those monthly statements the employees that he had under him and for supplies and so forth that he purchased during that month, that is where I ascertained the names of the different employees and amount of supplies that he bought from different concerns, got the full statement of the Commissioner of the General Land Office as to his expenditures for each and every month.

Q. As a result of that investigation did you find all of those persons named as payees in the checks, Exhibit "A," were real or fictitious persons?

A. I was unable to locate a single one.

Q. You examined in each case, did you, the locality

(Testimony of W. G. Good.)

where they were supposed to have been employed?

A. I did for the years 1908 and 1909.

Q. About what length of time did your investigation consume, Mr. Good?

A. About six weeks all told. [90]

Cross-examination.

(By Mr. McCORD.)

Q. Have you gone through all of these checks in Exhibit "A" recently? A. I have not, no, sir.

Q. You don't know whether those are the checks that you were investigating five or six years ago or not, do you?

A. When I was here in September or August, 1909, I secured from the National Bank of Commerce quite a bunch of checks that they had on hand that they had not transmitted to the commissioner of the General Land Office, to the treasury department at that time, they were the only checks that I ever saw in connection with Mr. McCoy's account; the others had been sent to Washington.

Q. Do you know what checks you ever saw—are those the checks—are you able to tell which ones you got from the National Bank of Commerce here in September, 1909?

A. Well, I had all the checks that were cashed, and if I remember right, for July and August at that time.

Q. July and August at that time?

A. Yes, sir, the bank turned them over to me and I had them in my possession for several days.

Q. Now, all these checks that have been introduced

(Testimony of W. G. Good.)

here and what is known as Exhibit "A," covering this entire length of time, did you ever go over these checks and examine them?

A. Not to-day; no, sir.

Q. What? A. Not to-day; no.

Q. Well, when did you examine them?

A. I have not examined any of these checks; I haven't seen them before until I just came in here except if any checks are included here that I saw while I was here in 1909.

Q. As a matter of fact, the only checks that you have ever seen in this McCoy transaction were the few checks in the months of July and August, 1909, that you got from the National Bank of Commerce?
[91]

A. That is all, yes, sir, at that time.

Q. Now, as a matter of fact, you only got the checks for the last month in 1909, did you not?

A. I think it covered July and August; I think they made a quarterly return to the—

Q. As a matter of fact, don't you know that they make a return or did make a return monthly and did send in the checks monthly?

A. They might have; however, since you brought the matter up, they didn't make a return at that time for July and I got the checks for July and August, for two months at that time.

Q. You never examined any other checks except those?

A. No, I wasn't in a position to; they were in Washington.

(Testimony of W. G. Good.)

Q. And you never examined them in Washington either, did you? A. No, sir.

Q. You never saw them? A. No, sir.

Q. And whether or not the checks referred to, the fictitious people referred to in these checks were the ones that you examined over in Montana or not you don't know? A. No.

Q. Except that they are similar names?

A. I never saw the checks before.

Q. You don't remember those names, King and all that bunch of twenty-five or thirty names, do you?

A. Well, going through here I could recall these names, checking up my work that I went through a year and a half ago or two years ago.

Q. Take the examination of the surveys in Montana where the men were supposed to be employed, the parties living, some of them at Glasgow, you said?

A. Yes, sir.

Q. What sort of an investigation did you make?
[92]

A. Well, as I said I secured from the office in Washington his original—

Q. I understand you got the names in Washington? A. Got his original vouchers and his—

Q. Got the names and the purported addresses and you went out to investigate. What did you find?

A. I had the original pay-rolls signed by these different parties and also the vouchers that I secured, were sent to me.

Q. What I want to get at is what investigation did

(Testimony of W. G. Good.)

you make. Did you go to Great Falls and investigate there?

A. Tried to locate these parties, yes, sir.

Q. What sort of an investigation did you make? How extensive? What did you do?

A. Well, I went to Great Falls for instance.

Q. Well, I want to know what you—

A. Ascertained from the postmaster, directory, any way possible to locate a certain man that I was after that was supposed to live at Great Falls. For instance, I went to the County Surveyor's office, took it for granted that these men were surveyors, to ascertain whether there was such a surveyor living in that part of the country.

Q. You didn't find any of them?

A. Couldn't locate a single man.

Q. And, as a matter of fact, after you made that investigation as to one or two men you reached the conclusion that they were all forgeries, didn't you?

A. I beg your pardon?

Q. Did you run down each man in the same way?

A. I did.

Q. I will ask you if it was upon your investigation that the Government reached the conclusion that this particular package of checks, aggregating \$15,000, were fraudulent.

A. Why, I made a report on the case and also what I gathered from the man that wrote the checks, Mr. McCoy admitted they were all forgeries to me. [93]

Q. In other words, your report was based on what

(Testimony of W. G. Good.)

Mr. McCoy told you and your investigation in a cursory way?

A. And what I heard in court at Tacoma when he was found guilty.

Q. When you found Mr. McCoy was guilty of perpetrating frauds you didn't spend very much time in tracing it down, did you?

A. It was not necessary.

Q. That is what I say.

A. He admitted everything.

Q. You knew the man was guilty, he admitted he was guilty, he admitted that he had robbed the Government and proved unfaithful to his trust and you were not busy in making any further investigations, were you? A. Not after that.

Q. And, as a matter of fact, the list of checks made up there now is based entirely upon the testimony of Mr. McCoy, isn't it, that is except for probably the months of July and August, 1909?

A. Why, I am sure I don't know; I don't quite understand what you are trying to get at.

Q. What I am trying to get at is this: I say in determining the fraudulent checks that had been issued the Government acted upon your report you say and you acted on Mr. McCoy's statement, didn't you, for the most part?

A. To a certain extent, yes; I couldn't ascertain who these men were and he admitted that there weren't such men and the checks were all fraudulent and—

Q. And when he admitted that, you were ready to

(Testimony of W. G. Good.)

assume that it was all true, weren't you?

A. Well, so far as the investigation that I made, I found out that to be a fact.

Q. Well, you made the investigation before you had him arrested? A. I did, yes, sir.

Q. But you didn't make it covering his entire work for the [94] two or three years; you only had him indicted or had him charged with the embezzlement of a few sums, did you not?

A. He was indicted here for depredations that took place here in Washington, yes.

Q. I understand that, but it was only one particular item, wasn't it, or two?

Mr. FISHBURNE.—That is objected to as not calling for the best evidence.

Q. I ask if you know.

A. Covering his shortages here for the past year, that is what he was indicted for here.

Q. You have not seen the indictment yourself, have you? A. I did see it.

Q. You don't remember that? A. No.

Q. You couldn't tell. That would not be the best evidence. A. That is a matter of record.

Q. What I am getting at is this: when you went over into northern Montana, you were the fellow that got onto his scheme, weren't you, Mr. Good?

A. Yes, sir.

Q. A couple of men up in northern Montana somewhere got into a row over a homestead and you went up there as special agent to investigate it, didn't you?

A. No, I beg your pardon.

(Testimony of W. G. Good.)

The COURT.—It is now time to adjourn. We will adjourn until to-morrow morning at ten o'clock. Gentlemen of the jury, until that time you will be permitted to separate. You are instructed that while you are out of court you must not talk about this case or any subject matter connected with it. You will not discuss it between yourselves or anyone or listen to what anybody may say about the case out of court. You are also especially instructed to have no conversation on [95] any subject whatever either with the witnesses or attorneys or parties interested.

(Further proceedings continued until 10 o'clock A. M., March 13, 1912.)

March 13, 1912, 10 o'clock A. M.

All present and the jury in the box.

Proceedings continued as follows:

W. G. GOOD on the stand.

Cross-examination (Resumed).

(By Mr. McCORD.)

Q. Mr. Good, you stated that you made certain investigations over in Montana as to the reality of these various payees named in the checks; did you make any investigation in any other State as to those that were issued fraudulently, covering surveys, purported surveys, in the State of Washington or the State of Idaho?

A. I only took up those in Montana and the ones here he was supposed to have been working on at the time that he was arrested.

(Testimony of W. G. Good.)

Redirect Examination.

(By Mr. FISHBURNE.)

Q. Mr. Good, you say you investigated his reports at Colville on the Colville Reservation where he was supposed to be working at the time he was arrested?

A. Yes, sir.

Q. Where was Mr. McCoy staying at the time he was supposed to be working at Colville?

A. Right here in this city.

Q. How long had he been staying here?

A. All that summer.

Q. The summer of 1909? A. Yes, sir.

Q. Now, you testified on cross-examination of Mr. McCord, [96] that you made an examination over in Montana and then later interviewed Mr. McCoy himself in Seattle. I want to ask you, Mr. Good, if you made an investigation regarding Mr. McCoy's work and reports at Great Falls, Montana?

A. I did so far as trying to locate the employees that he was supposed to have working for him.

Q. Did you make an investigation there to find J. D. King?

A. I did; I think his address was Great Falls.

Q. Did you find him? A. No, sir.

Q. Did you find F. M. Clark? A. I did not.

Q. A. J. Whitney? A. I did not.

Q. D. H. Sullivan? A. I did not.

Q. S. F. Cady? A. I did not.

Q. All of those names were supposed to be the names of employees at or near Great Falls, were they not?

(Testimony of W. G. Good.)

A. Their postoffice address was given as Great Falls.

Q. On the voucher that you spoke about?

A. Yes, sir.

Q. Now, did you make a similar investigation at Culbertson, Montana?

A. I did as to two or three parties there.

Q. You mean as to the parties supposed to be employed at that place? A. Yes, sir.

Q. Did you find there any George D. Cook?

A. I did not.

Q. Or F. M. McCulley? A. I did not.

Q. Did you make a similar investigation at Benton or Fort Benton, Montana?

A. I did as to one man I think there. [97]

Q. What man was that? To refresh your memory, was that H. M. Benson?

A. That is the name; yes, sir.

Q. Did you find H. M. Benson? A. I did not.

Q. What effort did you make to find any such person?

A. I made every effort possible to locate a man in a place of that kind by making inquiries from business men, the postmaster and so forth, men that have lived there for years that I knew of and supposed to know every one in the community, made a diligent search.

Q. Now, at the Colville Reservation in the State of Washington, Mr. Good, you say you made an investigation of Mr. McCoy's supposed work and employees? A. I did.

(Testimony of W. G. Good.)

Q. Did you investigate to learn whether one A. C. Jenkins was a real or fictitious person at Colville or near there? A. I did.

Q. Did you find any such person as A. C. Jenkins?
A. I couldn't locate him at all.

Q. You used the same methods of investigation there as you have described already? A. Yes, sir.

Q. What did you find as the result of these investigations as to whether or not Mr. McCoy himself had been on these public surveys doing the work that was indicated in his reports?

A. I couldn't learn that he had been on the ground himself at all.

Q. You couldn't learn that he had been on the ground at all? A. No, sir.

Q. And it was after making an investigation, as you have just testified to that you then came over and interviewed Mr. McCoy himself?

A. Yes, sir; all my evidence was negative, I couldn't locate a single man that was supposed to be employed by Mr. McCoy; [98] I couldn't learn where he had been on the ground himself and I simply had to confront Mr. McCoy in relation to it. [99]

(Witness excused.)

W. G. GOOD, being recalled as a witness on behalf of the plaintiff, testified as follows:

(By Mr. FISHBURNE.)

Q. Mr. Good, you have testified already that you called at the National Bank of Commerce at the time you were making the investigation regarding Mr.

(Testimony of W. G. Good.)

McCoy. Do you recollect which ones of these checks now in evidence, if any, the bank still had in its possession at that time?

A. They had the checks that were issued for July and August?

Q. Of 1909? A. Two months, yes, sir.

Q. What statements, if any, did you make to the officials of the bank at that time regarding those checks, regarding Mr. McCoy's transactions?

A. I secured the checks—

Mr. McCORD.—I object to that as to any statements he made so far as their being binding upon this defendant is concerned. This witness was trying to get evidence against Mr. McCoy. He was not authorized by the United States to bind the United States by any representations he might have made.

Mr. FISHBURNE.—I am proving notice to the bank, your Honor.

The COURT.—I will overrule the objection.

Mr. McCORD.—Exception.

A. (Continuing.) Well, in the first place, of course when I approached the bank I told them what my purpose was and what I was there for, that I was investigating Mr. McCoy's business methods, and if I remember right, I had a letter to the bank by Mr. Todd, I think, issued by Mr. Todd; however, they were very frank and secured these checks for July and August, and I had them in my possession for three or four days.

Q. And you returned them to the bank?

A. I returned them to the bank, and after—I think

(Testimony of W. G. Good.)

it was after Mr. McCoy plead guilty and I advised them of what took place in connection with Mr. McCoy and that those checks were fraudulent and that he admitted it, and so forth.

Q. And you told the banking officers, did you, that the checks were fraudulent? A. Oh, yes.

Q. And in what way they were fraudulent? [100]

A. Yes, sir, I gave them the history of the whole case and the transactions in connection with my investigation at that time.

Q. You left the checks in their possession?

A. Oh, yes, I returned them.

Cross-examination.

(By Mr. McCORD.)

Q. Whom did you have your conversation with?

A. Now, I can't recall the gentleman's name; there was two men, one man had charge of the Government's disbursing accounts, and then there was a young man there, either assistant cashier—I can't recall his name now.

Q. It was not an officer of the bank; you don't know whether it was or not?

A. He had some title—assistant cashier, I think he was.

(Witness excused.)

Mr. FISHBURNE. I offer in evidence as Plaintiff's Exhibit "K" a—

(Paper handed to Mr. McCord.)

Mr. FISHBURNE.—I offer in evidence as Plaintiff's Exhibit "K" a certain letter dated March 4, 1910, addressed to the National Bank of Commerce,

by the United States Attorney of Seattle, accompanied by a list of all the checks in dispute, which letter offers the bank permission to examine the checks at any time by its officials or by its attorneys.

Mr. McCORD.—I object to it as irrelevant, incompetent and immaterial.

Mr. FISHBURNE.—You will find the return of the marshal attached to the letter, showing service on the bank.

The COURT.—I overrule the objection. It may be admitted.

Letter referred to admitted in evidence and marked Plaintiff's Exhibit "K."

[Testimony of C. W. McKercher, for Plaintiff.]

C. W. McKERCHER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FISHBURNE.)

Q. Your name is C. W. McKercher?

A. It is. [101]

Q. You are a clerk in the United States attorney's office? A. Yes, sir.

Q. Do you recollect any official or employee of the National Bank of Commerce calling upon you in response to this letter which I hand you, Exhibit "K"?

A. I don't know that it was in response to that letter; Mr. Brownell, Chief Clerk at the bank, called.

Q. For what purpose did he call?

Mr. McCORD.—I object to that as incompetent,

(Testimony of C. W. McKercher.)

irrelevant, immaterial and hearsay. The clerk of the bank would not be able to bind this bank.

The COURT.—I overrule the objection.

A. He called to see the indorsements on the checks.

Q. The indorsements on these checks in dispute in this case? A. Yes, sir.

Q. Did you show him those checks? A. I did.

Q. Did you show him all of them? A. I did.

Q. Do you recollect how soon after the date of that letter, March 4, 1910, this happened?

A. No, I do not.

Q. Would you say it was shortly afterward?

Mr. McCORD.—I object to that as leading.

The COURT.—Overruled.

A. It was at the time that Mr. Todd was in Washington during the Ballinger-Pinchot controversy; I don't know the date of it except in that way.

Mr. McCORD.—That was in June, wasn't it?

The WITNESS.—I don't recall the date.

Mr. McCORD.—I saw Mr. Todd in Washington, that is how I happen to know.

Q. Did Mr. Brownell or anybody else for the bank at that time or any other time make any demand upon you for the possession of the checks? [102]

A. He did not.

Q. He made an examination of all of them?

A. As many as he wished.

Q. You offered him to inspect all of them?

A. I did.

(Testimony of C. W. McKercher.)

Cross-examination.

(By Mr. McCORD.)

Q. That was some several months after March 4th?

A. Yes, sir.

(Witness excused.)

Mr. McCORD.—I now renew my motion for a non-suit on the same ground, your Honor.

The COURT.—The motion is granted.

Mr. FISHBURNE.—The Court will allow us an exception.

The COURT.—Exception allowed. The Clerk will enter an order granting a nonsuit. The jurors are all excused from attendance until to-morrow morning at ten o'clock.

[Plaintiff's Exhibit "H"—Indictment.]

*In the United States Circuit Court for the Western
District of Washington, Western Division.*

No. 1933.

The United States of America,
Western District of Washington,—ss.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. P. McCOY,

Defendant.

INDICTMENT.

Violation of Sec. 5488, R. S.

July Term, A. D. 1909.

The Grand Jurors of the United States of America,
duly impaneled, sworn and charged to inquire within

and for the Western District of Washington, upon their oaths present: [103]

That one M. P. McCoy, heretofore, to wit: On the 31st day of March, 1909, and at various times between that date and the first day of September, 1909, in the City of Seattle, in said District, being then and there an examiner of surveys employed by the General Land Office of the United States, and as such officer being at said times and place a disbursing officer of the United States and entrusted with certain public moneys of the United States; did, by virtue of his said office and employment and while so employed and acting as such disbursing officer of the United States, receive and take into his possession certain public moneys of the United States, to wit: the sum of Five Thousand Seven Hundred and Eighteen (\$5,718.00) Dollars, lawful money of the United States of America, then and there the property of the United States, a more particular description of which money is to the Grand Jurors unknown; and the said M. P. McCoy did then and there wilfully, unlawfully and feloniously embezzle and convert to his own use said public moneys of the United States, to wit, the sum of Five Thousand Seven Hundred and Eighteen (\$5,718.00) Dollars, lawful money of the United States, a more particular description of which money so embezzled as aforesaid, being to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided, and against

120 *The National Bank of Commerce vs.*

the peace and dignity of the United States of America.

ELMER E. TODD,
United States Attorney.

Witnesses examined before Grand Jurors: Elmer E. Todd.

[Indorsed]: Indictment for Violation Sec. 5488, R. S. Case No. 1933. Plaintiff's Exhibit "H." United States District Court, Western Dist. of Washington. Filed March 13, 1912. A. W. Engle, Clerk. [104]

[Plaintiff's Exhibit "J"—Letters.]

4-207-r.

ETDB

DEPARTMENT OF THE INTERIOR
WTP GENERAL LAND OFFICE,
WASHINGTON.

February 28, 1912.

I hereby certify that the annexed copies of letters from this office addressed to M. P. McCoy, Examiner, are true and literal exemplifications of the official record of said letters in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal of United States General Land Office.]

H. W. SANFORD,
Recorder of the General Land Office.

Plaintiff's Exhibit "J" offered but not admitted in evidence.

In Reply Please Refer to

"E"

4''WB

172408

1907

DEPARTMENT OF THE INTERIOR. C L D B
GENERAL LAND OFFICE.

Washington, D. C., October 15, 1907.

Address only the

Commissioner of the General Land Office.

SCHEDULE OF COLVILLE ALLOTMENTS.

Mr. M. P. McCoy,

Examiner,

Seattle, Washington.

Sir:

Your letter of October 3, 1907, is received, reporting receipt of data from Olympia, and non-receipt of instructions, which [105] must have reached you soon after said date. I transmit herewith a copy of all the remaining parts of the Colville schedule of Indian allotments, which have not heretofore been supplied for your use in verifying and reporting their condition.

Of the 14 townships represented, six are still unsurveyed, and in those you are not required to investigate. Three tracts are in Tp. 39, R. 33, which you have already examined, but they were not found and reported by Deputy Shelton; so it is necessary to examine their status, and report as to the necessity of a correction survey. Allotment No. 278 for E. Du-

puis appears also omitted from the survey of section 34, Tp. 37, R. 33.

As you state you are not informed as to what townships have been suspended for segregation, you are now advised that a general suspending order was telegraphed to the Waterville and Spokane offices Sept. 20, 1906, affecting *all public lands* in the north or ceded part of the Colville Reserve, besides orders by letters specifying various townships.

Very respectfully,

FRED DENNETT,

Acting Commissioner.

JCP

In Reply Please Refer to

“E

WTP

208772-1907

DEPARTMENT OF THE INTERIOR. CLDB
GENERAL LAND OFFICE.

Washington, December 11, 1907.

Address only the
Commissioner of the General Land Office.

SCHEDULE OF INDIAN ALLOTMENTS.

Mr. M. P. McCoy,

Examiner of Surveys,
Seattle, Washington.

Sir:

I transmit herewith, as requested in your letter dated November 24, 1907, a copy of the schedule of Indian allotments in [106] T. 40 N., R. 32 E.,

Washington, transmitted with your letter dated June 2, 1907.

Very respectfully,

FRED DENNETT,

L.J.

Assistant Commissioner.

In Reply Please Refer to

E

WTP

211973-1907

DEPARTMENT OF THE INTERIOR. C L D B

GENERAL LAND OFFICE.

Washington, D. C., December 13, 1907.

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

Upon completion of the work in connection with the Indian allotments in the ceded portion of the Colville Indian Reservation, Washington, you are requested to prepare and transmit your detailed report of the examination of the survey of the standard lines in the diminished reservation, executed by Witham and Whitham, D. S., under their contract No. 635, examined by you last spring.

The returns of said survey have been pending in this office for some time and it is desired that action may be taken thereon at the earliest practicable date.

In connection with the work upon which you are now engaged, it is noted that a description of the allotments in the following unsurveyed townships has been furnished you:

Tps. 36 N., Rs. 29 and 30 E.

Tps. 35, 39 and 40 N., R. 31 E. [107]

T. 40 N., R. 35 E.

Tps. 35 N., Rs. 36 and 37 E.

Your present orders are not intended to cover any investigation of the allotments in these townships, as it will be the duty of the deputies who are to make the surveys therein to segregate said allotments from the public lands.

Very respectfully,

FRED DENNETT,

Assistant Commissioner.

L.J.

In Reply Please Refer to

E

WTP

208656-1907

DEPARTMENT OF THE INTERIOR. C L D B
GENERAL LAND OFFICE.

Washington, D. C., December 19, 1907.

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir.—

I transmit herewith for examination as to the *bona*

fides of the alleged settlers the applications for the survey of T. 39 N., R. 31 E. and T. 21 N., R. 9 E., Washington. The surveyor general has, by letter of even date herewith, been directed to transmit to you direct such other applications as may be received.

Very respectfully,

FRED DENNETT,

L.J. Assistant Commissioner. [108]

In Reply Please Refer to W.T.P.

E

WTP

218705—1907.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., December 26, 1907.

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

I transmit herewith for examination as to the *bona fides* of alleged settlers the applications for survey of T. 37 N., R. 40 E., Washington.

Very respectfully,

FRED DENNETT,

L.J. Assistant Commissioner.

In Reply Please Refer to

E

C.L.D.B.

DEPARTMENT OF THE INTERIOR.

W.T.P. GENERAL LAND OFFICE.

221864-1907.

Washington, D. C., January 7, 1908.

Address only the

Commissioner of the General Land Office.

INDIAN ALLOTMENTS. COLVILLE INDIAN
RESERVATION.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

In reply to your letter dated December 18, 1907, relative to allotment No. 65, Agnes, in T. 40 N., R. 32 E., Washington, you [109] are advised that the proper description of said allotment is as follows: W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ section 35 and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ east of Kettle River in section 35 and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ east of Kettle River in section 26, W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 26 and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ east of Kettle River in section 26, said township. Any other description furnished you is incorrect.

The allotment No. 11 of Leo Tonasket has been properly shown upon a supplemental plat approved March 1, 1907, and it appears that no further action is necessary in connection therewith on the part of this office, the facts contained in your letter dated June 2, 1907, relative thereto having been submitted to the Indian office with my letter dated June 15,

1907, and no further action seems to have been taken.

Very respectfully,

FRED DENNETT,

L.J.

Assistant Commissioner.

In Reply Please Refer to

DEPARTMENT OF THE INTERIOR. C.L.D.B.

E GENERAL LAND OFFICE.

W.T.P.

198421-221863

Washington, D. C., January 9, 1908.

1907

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

In reply to your letter dated November 6, 1907, relative to the survey of allotment No. 33, Julia Chesaw, in section 21, T. 40 N., R. 30 E., you are directed to submit your field notes of [110] survey to the surveyor general for transcribing and platting if you have not already done so.

Your action in proceeding with the examination of such surveys as can be reached at this season of the year, as reported in your letter dated December 18, 1907, is approved.

Upon completion thereof, you will prepare and

128 *The National Bank of Commerce vs.*

submit your reports, after which you will proceed with the examination of *bona fides*.

Very respectfully,

FRED DENNETT,

L.J.

Assistant Commissioner.

In Reply Please Refer to

“E”

36199-1908

WTP

DEPARTMENT OF THE INTERIOR. C L D B
GENERAL LAND OFFICE.

Washington, D. C., March 6, 1908.

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

In reply to your letter dated February 16, 1908, requesting instructions as to further work, you are hereby directed, upon receipt hereof, to proceed to western Montana and examine the *bona fides* of settlers in the following townships, the applications for the survey of which are herewith transmitted under separate cover: [111]

Group No. 1.

Ts. 1 N., Rs. 21 and 22 W.

T. 2 N., R. 19 W.

Tps. 3 and 4 N., R. 21 W.

Tps. 1 S., Rs. 21 and 22 W.

Tps. 2 and 3 S., R. 22 W.

Group No. 2.

T. 26 N., R. 22 W.

T. 29 N., R. 18 W.

Tps. 31 N., Rs. 20 and 24 W.

Tps. 32 N., Rs. 20, 21, 22 and 28 W.

tps. 33 and 34 N., R. 27 W.

Group 3.

Tps. 25 N., Rs. 33 and 34 W.

A map of Montana and a supply of blanks for reports are herewith transmitted.

You will take with you your surveying outfit for use in case it should be deemed expedient to later assign to you the field examination of certain surveys in Montana.

Very respectfully,

FRED DENNETT,

J.R.A.

Commissioner.

In Reply Please Refer to

“E”WTP

48326 53824

54781 57436

59454

1908.

DEPARTMENT OF THE INTERIOR. CLDB
GENERAL LAND OFFICE.

Washington, D. C., March 31, 1908.

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS. [112]

Mr. M. P. McCoy,

Examiner of Surveys,

Missoula, Montana.

Sir:

In reply to your letter dated March 17, 1908, you are requested to return to the Surveyor General for Washington all data in your hands relating to surveys in his district and to advise him to hold the same for further investigation.

In addition to the work heretofore assigned you in Montana, you are directed to examine the *bona fides* of applicants for the survey of the following townships in Montana, the petitions therefor being herewith transmitted, viz.:

T. 37 N., R. 2 W., T. 28 E., R. 19 E., T. 37 N., R. 21 E., T. 29 N., R. 36 E., Ts. 30 N., Rs. 33 and 34 E., T. 25 N., R. 33 E., and T. 26 N., R. 42 E.

In connection therewith you are directed to obtain the necessary data and examine the survey executed by Fred I. Hubbard, D. S., under his contract No. 510, and, if data is obtained from the surveyor General, that by Parkinson and Douglas, D. S., under their contract No. 517.

Very respectfully,

FRED DENNETT,

Commissioner.

J.R.A.

In Reply Please Refer to

E C.L.D.B.

DEPARTMENT OF THE INTERIOR.

DB. GENERAL LAND OFFICE.

Washington, D. C., April 14, 1908.

Address only the

Commissioner of the General Land Office.

Mr. M. P. McCoy,

Examiner of Surveys,

Helena, Montana.

Sir:

I have your letter of the 8th instant in which you ask to be allowed to continue examinations in the State of Washington, [113] as your wife cannot live in the high altitudes of Montana where you are at present assigned. You fear that your work has not been satisfactory to this office.

In reply you are informed that your services in the State of Washington have been very acceptable and no fault is found with the character of your work.

Your assignment to Montana was owing solely to the necessities of the service, and in the interest of good administration.

No instructions were given you as to a permanent assignment to Montana, but directions were forwarded indicating that your stay in the latter State would probably extend over the coming surveying season.

I regret that I cannot immediately comply with your personal request to return to Washington to continue examinations there as the exigencies of the work may require a longer detention in Montana.

I will, however, endeavor to have your examinations confined, as far as practicable, to the lower altitudes in eastern Montana, which I hope will enable you to prosecute the work with your usual fidelity.

Very respectfully,

L.J.

FRED DENNETT,
Commissioner.

In Reply Please Refer to

“E”

WTP

83637)

83658) 1908

83659)

DEPARTMENT OF THE INTERIOR. W T P
GENERAL LAND OFFICE.

Washington, D. C., May 5, 1909.

Address only the

Commissioner of the General Land Office.

PROCEDURE IN EXAMINATION OF
SURVEYS. [114]

Mr. M. J. McCoy,

Examiner of Surveys,

Great Falls, Montana.

Sir:

In reply to your letter dated April 17, 1908, you are hereby authorized to transport your two permanent assistants from the State of Washington to the District of Montana, where you are now engaged in the examination of surveys.

With reference to your proposed examination of surveys executed in northeastern Montana, payable

from special deposits by the Northern Pacific Railway Co., you are advised that this office has, by letter of even date herewith, requested the Secretary of the Interior for general authority to authorize examiners of surveys to employ transitmen to organize auxiliary parties and examine surveys under the personal supervision of the examiners and upon the granting of such authority, you will be further advised.

Very respectfully,

FRED DENNETT,

Commissioner.

JCB

In Reply Refer to

“E”

C.L.D.B

DEPARTMENT OF THE INTERIOR.

W.T.P. GENERAL LAND OFFICE.

83637)

88700) 1908

Washington, D. C., June 18, 1908.

Address only the

Commissioner of the General Land Office.

INSTRUCTIONS TO EXAMINER OF
SURVEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Great Falls, Montana.

Sir:

You are advised that under departmental authority dated May 5, 1908, examiners are authorized to employ a competent [115] assistant as transitman in charge of an auxiliary party under the supervision of the examiner to assist in the examination

of surveys, at a salary of \$100 per month and actual necessary expenses of transportation and subsistence. In accordance with your recommendation dated April 21, 1908, you are hereby authorized to employ John D. King as transitman to assist you in the examination of the surveys assigned to you in north-eastern Montana, and as outlined in your said letter. A solar transit, tripod, chain, tape and set of pins has been sent to you at Culbertson, Montana, the receipt for the two boxes sent by express being herewith transmitted. The report of work done by the transitman should be included in your weekly report.

Very respectfully,

H. H. SCHWARTZ,

JCP

Acting Assistant Commissioner.

In Reply Please Refer to

DEPARTMENT OF THE INTERIOR. C.L.D.B.

E. GENERAL LAND OFFICE.

W.T.P.

151779-1908.

Washington, D. C., August 22, 1908.

Address only the

Commissioner of the General Land Office

INSTRUCTIONS TO EXAMINER OF SUR-
VEYS.

Mr. M. P. McCoy,

Examiner of Surveys,

Great Falls, Montana.

Sir:

In reply to your letter dated August 12, 1908, relative to the examination of surveys in Montana,

you are advised that the Surveyor General has been directed to transmit to you at the earliest practicable date the data for the examination of contracts No. 515, A. E. Cumming, D. S., Nos. 530 and 531, Fessenden and Ross, D. D., and No. 542, R. C. Durnford, D. S. [116]

The survey under contract No. 505 within the Fort Peck Indian Reservation is being examined by A. F. Dunnington, Topographer in Charge of the surveys within said reservation.

Weather and flood conditions in the southeastern part of the district early in the season rendered it expedient for examiner Wilkes to take up some of the work which it was thought would be examined by you later, but it is believed that there will be enough completed work in the northeastern part of the state to keep you steadily at work.

The Surveyor General reports the probable early completion of the contracts Nos. 518 and 519, George H. Potter, D. S. and Nos. 526 and 527, Williams and Hertz, D. S.

You will include also the examination of T. 9 N., R. 33 E., Harley J. Riley, D. S., under contract No. 500, Tps. 2 and 3 N., R. 28 E., Page and Page, D. S., contract No. 513 and T. 7 S. R. 24 E., contract No. 512, George L. Elmer, D. S., the same being isolated townships not yet examined.

Mr. Wilkes, whose address is Miles City, Montana, has been directed to confine his operations to the district south of the Yellowstone and east of the Big Horn Rivers and to send to you at Great Falls any

data in his hands for the isolated work above referred to.

Very respectfully,

FRED DENNETT,

ALP.

Commissioner.

In Reply Please Refer to.

“E”

W.T.P.

W.T.P.

C.L.D.B.

DEPARTMENT OF THE INTERIOR.

189338-1908 GENERAL LAND OFFICE.

Washington, D. C., November 25, 1908.

Address only the

Commissioner of the General Land Office

INSTRUCTIONS TO EXAMINER OF SUR-
VEYS. [117]

Mr. M. P. McCoy,

Examiner of Surveys,

Great Falls, Montana.

Sir:

In reply to your letter dated November 8, 1908, you are directed, upon the advent of unfavorable weather conditions for the prosecution of field work, to return to Seattle, Washington, and submit your reports.

You are requested to inform the Surveyor General of Montana, upon completion of your field examination of each survey, whether you will recom-

mend the acceptance thereof, or, if corrections are required, to what extent.

Very respectfully,

FRED DENNETT,

JCP.

Commissioner.

OFFICE AUDITOR INTERIOR DEPT.

Feb 28 1912

A.M.9 12 2 4 P.M.

March 4, 1910.

The National Bank of Commerce,
Seattle, Washington.

Gentlemen:

On behalf of the United States of America, I hereby make demand upon you for repayment of the sum of \$15,129.81, on account of checks which were issued by M. P. McCoy, examiner of surveys and special disbursing agent for the Department of the Interior during the years 1907, 1908 and 1909, which checks were paid by you upon forged endorsements, the endorsement of payee in each instance being a forgery.

Attached hereto is the list of said checks with the date of each, the name of the payee, the amount of each check, and the bank or banks through which it was passed before being paid by the National Bank of Commerce. [118]

All these checks are in my office at the Federal Building and your officers and attorneys will be allowed to inspect them if you so desire.

Respectfully,

ELMER E. TODD,

Encl.

United States Attorney.

RETURN OF SERVICE.

The United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed letter on the therein named bank by delivering the original thereof to R. R. Spencer, its 1st vice-president, personally, at the place of business of said bank at Seattle in said District on the 5th day of March, A. D. 1910.

C. B. HOPKINS,
United States Marshal.
By M. T. McGraw,
Deputy. [119]

| [Exhibit "K"—Checks.] | | | Bank or Bank through which check passed. | |
|-----------------------|---------------|-----------------|---|----------------------|
| No. | Date. | Payee. | Amount. | Columbia Valley Bank |
| 1 | Oct. 14, 1907 | Albert Peterson | \$20.00 | " |
| 2 | " 14, " | Nels Anderson | 20.00 | " |
| 3 | " 14, " | Wm. Jager | 60.00 | " |
| 4 | " 14, " | H. Berggren | 47.50 | " |
| 5 | " 31, " | F. L. Day | 28.00 | " |
| 6 | " 31, " | G. Hoge | 28.00 | " |
| 7 | " 31, " | Frank Engberg | 96.00 | " |
| 8 | " 31, " | Chas. Lund | 78.75 | " |
| 9 | " 31, " | J. D. King | 62.00 | " |
| 10 | " 31, " | F. M. Clark | 62.00 | " |
| 12 | Nov. 30, " | F. L. Day | 52.50 | " |
| 13 | " 30, " | G. Hoge | 52.50 | " |
| 14 | " 30, " | Frank Engberg | 180.00 | " |
| 15 | " 30, " | Chas. Lund | 150.00 | " |
| 16 | " 30, " | J. D. King | 60.00 | " |
| 17 | " 30, " | F. M. Clark | 60.00 | " |
| 19 | Dec. 31, " | F. L. Day | 54.25 | " |
| 20 | " 31, " | G. Hoge | 54.25 | " |
| 21 | " 31, " | Frank Engberg | 186.00 | " |
| 22 | " 31, " | Chas. Lund | 155.00 | " |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. |
|-----|---------------|---------------|---------|---|
| 23 | Dec. 31, 1907 | F. M. Clark | \$62.00 | Columbia Valley Bank |
| 24 | " 31, " | J. D. King | 62.00 | " |
| 26 | Jan. 10, 1908 | F. L. Day | 17.50 | " |
| 27 | " 10, " | G. Hoge | 17.50 | " |
| 28 | " 10, " | Frank Engberg | 60.00 | " |
| 22 | " 31, " | Chas. Lund | 50.00 | " |
| 30 | " 13, " | J. D. King | 26.00 | " |
| 31 | " 13, " | F. M. Clark | 26.00 | Seattle Natl. Bank |
| 43 | May 6, " | John Jabelson | 27.50 | First Natl. Bank of Havre, Mont. |
| 44 | " 6, " | John S. Cole | 36.00 | " |
| 45 | " 31, " | J. D. King | 62.00 | " |
| 46 | " 31, " | F. M. Clark | 62.00 | " |
| 47 | " 31, " | A. J. Whitney | 54.25 | " |
| 48 | " 31, " | H. M. Benson | 125.00 | " |
| 49 | " 31, " | C. A. Thrapp | 150.00 | " |
| 50 | June 10, " | H. M. Benson | 48.75 | " |
| 51 | " 10, " | C. A. Thrapp | 72.00 | " |
| 52 | " 23, " | J. E. Scherer | 78.00 | First Natl. Bank Glasgow, |
| 53 | " 23, " | H. M. Benson | 63.75 | Mont., & Seattle Natl. Bank |
| 54 | " 30, " | J. D. King | 69.33 | " [121] |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. |
|-----|---------------|----------------|---------|---|
| 55 | June 30, 1908 | F. M. Clark | \$60.00 | First Natl. Bank Glasgow, |
| 56 | " 30, | A. J. Whitney | 54.25 | Mont., & Seattle Natl. Bank |
| 57 | " 30, | H. A. Moore | 63.00 | " |
| 58 | " 30, | D. H. Sullivan | 12.25 | " |
| 59 | " 30, | Geo. D. Cook | 14.00 | " |
| 60 | " 30, | F. W. McCulley | 14.00 | " |
| 61 | " 30, | S. F. Cady | 12.25 | " |
| 62 | " 30, | H. M. Benson | 54.00 | " |
| 2 | July 31, | J. D. King | 100.00 | Seattle Natl. Bank |
| 3 | " 31, | F. M. Clark | 62.00 | " |
| 4 | " 31, | Geo. D. Cook | 62.00 | First Natl. Bank Glasgow, |
| 5 | " 31, | F. M. McCulley | 62.00 | Mont. & Seattle Natl. |
| 6 | " 31, | A. J. Whitney | 62.00 | Bank |
| 7 | " 31, | H. A. Moore | 279.00 | " |
| 8 | " 31, | D. H. Sullivan | 54.25 | " |
| 9 | " 31, | S. F. Cady | 54.25 | " |
| 10 | " 31, | H. M. Benson | 248.00 | " |
| 12 | Aug. 31, | J. D. King | 100.00 | Seattle Natl. Bank |
| 13 | " 31, | F. M. Clark | 62.00 | " |
| 14 | " 31, | Geo. D. Cook | 62.00 | First Natl. Bank Glasgow, and Seattle Natl. Bank |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. |
|------|---------------|----------------|---------|---|
| 15 | Aug. 31, 1908 | F. W. McCulley | \$62.00 | Seattle Natl. Bank |
| 16 | " 31, | A. J. Whitney | 62.00 | First Natl. Bank Glasgow, Mont., & Seattle Natl. |
| 17 | " 31, | H. A. Moore | 279.00 | " |
| 18 | " 31, | D. H. Sullivan | 54.25 | " |
| 19 | " 31, | S. F. Cady | 54.25 | " |
| 20 | " 31, | H. M. Benson | 248.00 | " |
| 22—A | Sept. 8, | A. Feters | 7.85 | Seattle National Bank |
| 22—B | " 30, | J. D. King | 100.00 | " |
| 23 | " 30, | F. M. Clark | 60.00 | " |
| 24 | " 30, | Geo. D. Cook | 60.00 | " |
| 25 | " 30, | F. W. McCulley | 60.00 | " |
| 26 | " 30, | A. J. Whitney | 60.00 | " |
| 27 | " 30, | H. A. Moore | 270.00 | " |
| 28 | " 30, | D. H. Sullivan | 52.50 | " |
| 29 | " 30, | S. F. Cady | 52.50 | " |
| 30 | " 30, | H. M. Benson | 240.00 | " |
| 1 | Oct. 31, | J. D. King | 100.00 | " |
| 2 | " 31, | F. M. Clark | 62.00 | " |
| 3 | " 31, | H. A. Moore | 279.00 | " |
| 4 | " 31, | Geo. D. Cook | 62.00 | " |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. |
|-----|---------------|----------------|---------|---|
| 5 | Oct. 31, 1908 | F. W. McCulley | \$62.00 | Seattle National Bank |
| 6 | " 31, " | A. J. Whitney | 62.00 | " |
| 7 | " 31, " | H. M. Benson | 248.00 | " |
| 8 | " 31, " | (Blank) | 54.25 | " |
| 9 | " 31, " | S. F. Cady | 54.25 | " |
| 11 | Nov. 30, " | J. D. King | 100.00 | National Bank of Montana, |
| 12 | " 30, " | F. M. Clark | 60.00 | Helena |
| 13 | " 30, " | Geo. D. Cook | 60.00 | " |
| 14 | " 30, " | F. W. McCulley | 60.00 | " |
| 15 | " 30, " | A. J. Whitney | 60.00 | " |
| 16 | " 30, " | H. A. Moore | 270.00 | " |
| 17 | " 30, " | D. H. Sullivan | 52.50 | " |
| 18 | " 30, " | S. F. Cady | 52.50 | " |
| 19 | " 30, " | H. M. Benson | 240.00 | " |
| 21 | Dec. 31, " | J. D. King | 100.00 | Seattle National Bank |
| 22 | " 31, " | F. M. Clark | 62.00 | " |
| 23 | " 31, " | Geo. D. Cook | 62.00 | " |
| 24 | " 31, " | F. W. McCulley | 62.00 | " |
| 25 | " 31, " | A. J. Whitney | 62.00 | " |
| 26 | " 31, " | D. H. Sullivan | 54.25 | " |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. Seattle National Bank |
|-----|---------------|------------------|---------|--|
| 27 | Dec. 31, 1908 | S. F. Cady | \$54.25 | " |
| 28 | " 31, " | T. E. Lynch | 24.50 | " |
| 29 | " 31, " | Claude J. Perret | 24.50 | " |
| 30 | " 31, " | H. M. Benson | 276.00 | " |
| 31 | " 31, " | H. A. Moore | 279.00 | " |
| 1 | Jan. 5, 1909 | J. D. King | 12.90 | " |
| 2 | " 5, " | F. M. Clark | 8.00 | " |
| 3 | " 8, " | Geo. D. Cook | 16.00 | " |
| 4 | " 8, " | F. W. McCulley | 16.00 | " |
| 5 | " 8, " | A. J. Whitney | 16.00 | " |
| 6 | " 8, " | D. H. Sullivan | 14.00 | " |
| 7 | " 8, " | S. F. Cady | 14.00 | " |
| 8 | " 8, " | H. M. Benson | 48.00 | " |
| 9 | " 8, " | H. A. Moore | 72.00 | " |
| 14 | Mar. 31, " | J. D. King | 35.48 | " |
| 15 | " 31, " | F. M. Clark | 22.00 | " |
| 16 | " 31, " | Geo. D. Cook | 18.00 | " |
| 17 | " 31, " | F. W. McCulley | 18.00 | " |
| 18 | " 31, " | A. J. Whitney | 18.00 | " |
| 19 | " 31, " | Joe Mikel | 14.00 | " |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. Seattle National Bank |
|-----|---------------|----------------|---------|--|
| 20 | Mar. 31, 1909 | E. M. Bassett | \$14.00 | " |
| 21 | " 31, | Geo. K. Cooper | 14.00 | " |
| 22 | " 31, | Chas. Paine | 14.00 | " |
| 23 | " 31, | H. M. Benson | 82.50 | " |
| 24 | " 31, | A. C. Junkin | 72.00 | " |
| 1 | Apr. 30, | J. D. King | 100.00 | " |
| 2 | " 30, | F. M. Clark | 60.00 | " |
| 3 | " 30, | Geo. D. Cook | 60.00 | " |
| 4 | " 30, | F. W. McCulley | 60.00 | " |
| 5 | " 30, | A. J. Whitney | 60.00 | " |
| 6 | " 30, | Joe Mikel | 52.50 | " |
| 7 | " 30, | E. M. Bassett | 52.50 | " |
| 8 | " 30, | Geo. K. Cooper | 52.50 | " |
| 9 | " 30, | Chas. Paine | 52.50 | " |
| 10 | " 30, | A. C. Junkin | 270.00 | " |
| 11 | " 30, | H. M. Benson | 300.00 | " |
| 13 | May 31, | J. D. King | 100.00 | " |
| 14 | " 31, | F. M. Clark | 62.00 | " |
| 15 | " 31, | Geo. D. Cook | 62.00 | " |
| 16 | " 31, | F. W. McCulley | 62.00 | " |
| 17 | " 31, | A. J. Whitney | 62.00 | " |

| No. | Date. | Payee. | Amount. | Bank or Bank through which check passed. |
|---|---------------|----------------|---------|---|
| 5 | July 31, 1909 | A. J. Whitney | \$62.00 | Seattle National Bank |
| 6 | " 31, | Joe Mikel | 54.25 | " |
| 7 | " 31, | E. M. Bassett | 54.25 | " |
| 8 | " 31, | Geo. K. Cooper | 54.25 | " |
| 9 | " 31, | Chas. Paine | 54.25 | " |
| 10 | " 31, | A. C. Junkin | 279.00 | " |
| 11 | " 31, | H. M. Benson | 310.00 | " |
| 13 | Aug. 31, | J. D. King | 100.00 | " |
| 14 | " 31, | F. M. Clark | 62.00 | " |
| 15 | " 31, | Geo. D. Cook | 62.00 | " |
| 16 | " 31, | F. W. McCulley | 62.00 | " |
| 17 | " 31, | A. J. Whitney | 62.00 | " |
| 18 | " 31, | Joe Mikel | 54.25 | " |
| 19 | " 31, | E. M. Bassett | 54.25 | " |
| 20 | " 31, | Geo. K. Cooper | 54.25 | " |
| 21 | " 31, | Chas. Paine | 54.25 | " |
| 22 | " 31, | A. C. Junkin | 279.00 | " |
| 23 | " 31, | H. M. Benson | 310.00 | " |
| [Indorsed]: Ex. "K." 1933. Filed U. S. District Court, Western District of Washington. Mar. 13, 1912. A. W. Engle, Clerk. By S., Deputy. [128] | | | | |

Thereupon, defendant National Bank of Commerce offered the following testimony in its behalf, to wit:

[Testimony of R. S. Walker, for Defendant.]

R. S. WALKER, sworn as a witness for defendant, testified as follows:

Direct Examination.

(By Mr. McCORD.)

Q. What is your name? A. R. S. Walker.

Q. What is your position?

A. Assistant Cashier of the National Bank of Commerce.

Q. How long have you occupied that position?

A. Since 1904.

Q. You are familiar with the account carried in that bank by M. P. McCoy, Special Disbursing Agent and Examiner of Surveys of the United States? A. Yes.

Q. Do you remember when it was opened?

Mr. FISHBURNE.—Pardon me, one matter more, before you proceed I desire the record to show—I just thought about it—that we have failed to put in any denial to your amended answer.

Mr. McCORD.—It may be considered denied.

Stipulated and agreed between counsel that the amended answer of the defendant is denied by the Government.

Q. Do you remember when it was opened?

A. My recollection is it was in October, 1903.

Q. What was the course of dealing with that account in regard to balancing the books with McCoy,

(Testimony of R. S. Walker.)
on the Government account?

A. Well, we rendered a statement at the end of each month.

Q. To whom?

A. We rendered a statement, made a statement in duplicate, and the original of the statement was sent to the disbursing officer, and the duplicate sent to the Secretary of the Treasury at Washington.

Q. That was done monthly?

A. Yes; at the end of every month. [129]

Q. What became of the checks returned to and paid by the bank?

A. The checks were sent with and attached to the duplicate statement.

Q. I will ask you if you have caused to be made up statement showing the statements sent by the bank from time to time to the Treasury Department; and also of statements sent to McCoy from time to time by the bank? A. Yes.

Q. Are these the statements? A. Yes.

Mr. McCORD.—Mark these as Defendant's Exhibit No. 1 for identification.

Q. I will ask you to examine this Defendant's Identification No. 1, and I will ask you if that is a copy of the statement you have just referred to which were made from time to time by the bank and sent to the Treasury Department and Mr. McCoy?

A. Yes, it is.

Mr. McCORD.—I offer in evidence Defendant's Exhibit No. 1.

Mr. FISHBURNE.—Objected to on the ground

(Testimony of R. S. Walker.)

that it is incompetent, irrelevant and immaterial to any issues in this case.

(Argument.)

The COURT.—Objection sustained at this time, and you may be allowed an exception.

Mr. McCORD.—Will your Honor indicate on what ground it is sustained?

The COURT.—Why, the making of a monthly statement out would not be a defence, and would not be a ratification under the law. If there was any testimony showing that after they had knowledge that this act was done it was ratified, then this would tend to reinforce the other testimony.

Mr. McCORD.—That goes to the merits of the objection; I thought there might be some technical reason.

The COURT.—No; it goes to the fact that there was no ratification of the McCoy monthly statement; no further act [130] of the representatives of the Government after knowledge of the fact which would be a ratification; therefore, I do not think it is competent.

Mr. McCORD.—I offer it in evidence in order to show that the Government duly received these statements; not for the purpose of showing that it would be bound necessarily by them, but that they received these; and it is one element in the chain of ratification; that is offered, your Honor, in view of the exhibits introduced by the Government which show that Mr. Dennett, the Commissioner of the General Land Office, who had control of these entire proceedings,

(Testimony of R. S. Walker.)

has by his own signature, examined and verified the vouchers, and verified the returns, and has over his own signature certified that they were correct. I offer them further in view of the fact that the evidence that has been introduced shows that the officers of the Government of the United States had full knowledge of all of the facts, and ratified and approved these statements of this account, and recognized that McCoy owes the United States the money and recognized that it was the indebtedness of McCoy to the United States of United States money and property which was appropriated. This evidence is an element in line with that defense.

The COURT.—You may reoffer this after you have produced some further testimony to show knowledge on the part of the Government.

Mr. McCORD.—I think the evidence is in here now upon which it is based.

The COURT.—Then the objection is sustained.

Mr. McCORD.—I want to call the Court's attention particularly to it. The testimony to which I refer is the testimony shown in this indictment where the United States in 1909, September, 1909, acting under the direction of the Department of Justice, one of the departments of the Government of the [131] United States, entered into and directed the prosecution of M. P. McCoy, whereby he was indicted, and in that indictment it was specifically charged that Mr. McCoy had embezzled \$5,718.00 of the money of the United States then and there being the property of the United States. Now, then,

(Testimony of R. S. Walker.)

I take it under the authorities, and particularly under the authority of the case of *U. S. v. Walker*, 139 U. S. —, that we are entitled to show estoppel on the part of the United States because one of the great departments of this Government in this particular instance has charged that this money they are now suing for in this action was the money of the United States and not the money of defendant National Bank of Commerce. Not only that, but they have prosecuted Mr. McCoy, and convicted him, and he was sentenced to the penitentiary, and he served out his term; all of which goes to show that the Government of the United States through its officers sworn and then proved and acted upon the assumption throughout that the money that was stolen by McCoy was not the money of the National Bank of Commerce, but was the money and property of the Government of the United States. If that is true, *the* when McCoy was indicted and prosecuted, he was prosecuted wrongfully and in disregard of his rights when he was punished and served out his sentence upon the theory that at least \$5,718 of this money was the money and property of the United States which he embezzled. How can it be said now, your Honor, that the United States in 1909, after all of the facts had been brought out that it solemnly acting under the jurisdiction of the Department of Justice under the direction of the Attorney General of the United States indicted this man for stealing the money of the United States, this particular money and convicted him of so doing; and now be heard to

(Testimony of R. S. Walker.)

say it was not the money of the United States, but of the defendant. I think that the United States cannot be put in the attitude [132] of saying in one breath it is our money and we will convict and punish you for stealing it; and then turn immediately around afterwards and bring a civil action for the recovery of the money and say it is not our money. I say that when one Department of this Government acting through its officers authorized to bind it shows that state of facts that becomes a verity and that the Government cannot be heard to subsequently change its position and deny the fact.

The COURT.—The question occurs to me, this money might be the money of the United States and the United States still hold McCoy for embezzling it, and the defendant still be liable to account for the money. The money was the Government funds and were placed in the depositary with the restriction that certain duties devolved upon McCoy relative to its disbursement; and I think that under the holding of the Court of Appeals, that the defendant is responsible for the improper disbursement of the money. Objection will have to be sustained to the admission in evidence of that testimony.

Statements refused admission in evidence.

Mr. McCORD.—Exception. That is all, Mr. Walker.

Mr. FISHBURNE.—That is all; we have no cross-examination.

Mr. McCORD.—That is all; I rest my case.

Mr. FISHBURNE.—The Government rests. I

have no further testimony, and I desire to have the jury dismissed and I wish to make a motion and argue it to the Court, which I don't desire to state in the presence of the jury.

(Jury excused.)

Mr. McCORD.—I want an exception to your Honor's rulings.

The COURT.—Let the record show they are allowed.

Mr. FISHBURNE.—We move at this time that the Court instruct the jury to bring in a verdict for the plaintiff for the amount prayed for in the complaint on the ground:

That plaintiff has proved by the evidence a case according [133] to the decision of the Circuit Court of Appeals here, and that the defendant has failed to put in any testimony negating the plaintiff's case, and on the pleadings and all of the records of the case.

(Argument of counsel.)

The COURT.—Motion granted.

Mr. McCORD.—Exception.

(Exception allowed by the Court.)

(Jury recalled.)

The COURT.—Gentlemen of the jury: I will instruct you to return a verdict for the plaintiff in the sum of \$15,129.81 together with interest from the 5th day of March, 1910; and I will appoint Mr. McCoy your foreman to sign the verdict.

Mr. McCORD.—I don't know whether this is the proper time to except to your instruction, and to your

Honor's action in directing an instructed verdict in this case.

The COURT.—Yes, note an exception.

(Verdict signed by the foreman as directed, and read by order of Court.)

The COURT.—You may file the verdict, Mr. Clerk.

(Verdict filed by the clerk as directed by the Court.)

Mr. McCORD.—I object to the filing of the verdict for the reason that the verdict is not supported by the evidence, and is contrary to the evidence; and particularly in addition to the general objections to the jury signing the verdict and the filing of the instructed verdict I object to the computation of interest from March 5, 1910, especially contending that they are not entitled to interest until the commencement of suit, under the laws of this State and suit not being commenced until December 10, 1910.

The COURT.—Note the exception. You will be excused from further consideration of this case, gentlemen of the jury.

(Jury discharged.) [134]

Mr. McCORD.—I would like also to have an exception to the refusal of the Court to give the instructions requested by the defendant, numbered one to eight, inclusive, and I want a separate exception to each one of them.

The COURT.—You want them filed.

Mr. McCORD.—Yes, I want them filed.

The COURT.—Note in the record they are filed with the clerk.

Mr. McCORD.—And let the record show an ex-

ception. I don't just remember the regular time for preparing and serving a bill of exceptions, I think it is only ten days, and I want to have that extended. I want the time extended thirty days in addition to the time provided by the rules and statutes.

Mr. FISHBURNE.—No objection to that.

The COURT.—Prepare a formal order and present it and I will sign it and have it put in the record.

Trial closed. [135]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a Corporation,

Defendant.

Instructions Requested by Defendant.

STATEMENT.

Plaintiff brings this action to recover from the defendant the sum of \$15,129.81, the amount of money the plaintiff claims the defendant paid out upon checks drawn by M. P. McCoy, Examiner of Surveys and Special Disbursing Agent of the United States and made payable by McCoy to fictitious persons, the United States having deposited a large sum of money to the credit of McCoy as such Special

Disbursing Agent in the defendant bank; that such checks were drawn by McCoy fraudulently and not for the purpose of paying the legitimate obligations of the United States.

The complaint further alleges that the checks so paid were charged to the account of the United States by the defendant bank and that credit was given to the defendant bank by the United States in settlement with the bank without knowledge on the part of the plaintiff that the said McCoy had wrongfully issued the checks in question for the purpose of defrauding the United States, and that the fraud of the said McCoy was not discovered until about the 30th of September, 1909; that the plaintiff notified the defendant of the discovery of the forgeries and on [136] March 5th, 1910, demanded from the defendant payment of the sum in controversy, which plaintiff claims had been credited to the defendant by mistake on account of the forged endorsements.

Plaintiff further contends that the defendant has refused to pay the amount sued for and that the whole sum is now due and unpaid.

The defendant admits that McCoy was Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; admits that during the years 1907, 1908 and 1909 the plaintiff deposited with the defendant a large sum of money to the credit of McCoy; admits that certain checks drawn by McCoy against said deposit made by the plaintiff to the defendant were paid by the defendant and that the respective amounts thereof were charged against the deposit of the plaintiff; ad-

mits that it has refused to pay the plaintiff the sum sued for or any part thereof; and denies all of the other allegations of the complaint.

The defendant further sets up two affirmative defenses; First: that the deposits made by the United States with the defendant to the credit of said McCoy as Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by McCoy against said deposits and that all checks drawn by McCoy against the deposits of the plaintiff were paid from time to time as the same were presented for payment. That it was not the duty of the defendant to inquire as to the names of the payees of such checks; that all checks paid by the defendant as set forth in the complaint were [137] duly and regularly signed with the genuine signature of said McCoy as Examiner of Surveys and Special Disbursing Agent; that monthly statements were rendered to the plaintiff and to the said McCoy showing the amount of each check drawn by said McCoy against the said deposits and the aggregate of such checks, and that monthly statements were duly and regularly rendered in conformity with the usual custom of bankers. That no complaint of any kind was made by the plaintiff to the defendant as to the improper payment of these checks by reason of any forgeries, fictitious payees,

or otherwise, until the 5th of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of the said McCoy and upon the rendition of the statements of his account to the United States to have examined the said account and to have promptly notified the defendant of the alleged forgeries and fraud if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries and fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, and that by reason of the failure of the plaintiff to promptly notify the defendant of the fraud of the said McCoy, the defendant was prohibited from asserting any claim it may have had against the various banks that forwarded the checks in question to the defendant for payment, and that by reason of plaintiff's failure to so notify the defendant of such fraud on the part of the said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers was sent by the defendant to the plaintiff the said plaintiff [138] is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

Second: The defendant alleges that the plaintiff received the proceeds of the fraudulent checks and that the said McCoy expended the money collected

by him indirectly upon these checks in payment of the legitimate obligations of the Government, created by McCoy, and which he was authorized by law to create; that the plaintiff has not been damaged by the acts of the said McCoy by reason of the fact the Government received the benefit of the funds claimed to have been stolen by the said McCoy.

The plaintiff denies the affirmative allegations of the defendant's answer.

I.

If you find from the evidence in this case that at the time the account between M. P. McCoy and the defendant was opened by the plaintiff no special instructions were given by the plaintiff to the defendant limiting the right of McCoy to draw checks against the account so opened in his favor with the defendant bank, then I instruct you that the said McCoy, as Examiner of Surveys and Special Disbursing Agent had a legal right to draw checks against said account in the same way that an individual depositor of a bank might draw checks, and the said McCoy would have had the legal right to draw checks against said account in defendant's bank payable to bearer or to himself, and would have had the legal right to have drawn checks in his own favor, and it would have been the duty of the defendant bank to have paid the amount of such checks direct to the said McCoy, if he had demanded such payment. [139]

II.

A check is a bill of exchange drawn on a bank payable on demand, and a bill of exchange is payable

to bearer: (a) When it is so stated in the check. (b) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable. And if you find from the evidence in this case that the checks described in the complaint were made payable to fictitious persons and that McCoy at the time he drew such checks knew that the payees were fictitious persons, then I instruct you that the checks in question have the same legal force and effect as though the checks had been drawn specifically to bearer, and the fictitious payees must be regarded by you in relation to this matter as mere nonentities, and the checks are equivalent in law to instruments made payable to bearer; and if such checks were in legal effect made payable to bearer, then the defendant bank was under no legal duty or obligation to inquire into the genuineness or validity of the payees of the checks or the genuineness or validity of the endorsement of the names of such fictitious payees upon the back of the checks, and the defendant had the legal right to pay said checks upon presentation in the same way as though they had been made payable to bearer in each instance; and the defendant violated no duty that it owed to the plaintiff in paying said checks, and it was guilty of no negligence in so paying them, and is without fault, and the plaintiff is not entitled to recover in this action and your verdict must be for the defendant. [140]

III.

The plaintiff contends that the money it is suing

for was money paid under a mistake of fact, which may be recovered back by it.

“It must be taken as settled that when the United States becomes a party to what is called ‘commercial paper,’—by which is meant that class of paper which is transferable by endorsement or delivery, and in private parties is exempt,—is exempt in the hands of innocent holders from inquiry into the circumstances under which it is put into circulation—they are bound in any Court to whose jurisdiction they submit by the same principles that govern individuals in their relation to such paper.”

“Laches is not imputable to the Government in its character as sovereign by those subject to its dominion. Still a Government may suffer through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and endorsers that is required of individuals, and if it fails in this, its claim upon the parties is lost. Generally in respect to all the commercial transactions of the Government, if an officer specially charged with the performance of any duty and authorized to represent the Government in that behalf, neglects that duty and loss ensues, the Government must bear the consequences of his neglect. But this cannot happen until the officers specifically charged with the duty, if there be one, have acted or ought to have acted. As the Government can only act through its officers,

it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. [141] If it fails in this it fails in the performance of its own duties and must be charged with the consequences that follow such omissions in the commercial world." (Cooke v. U. S. 91 U. S.)

If you find from the evidence in this case that M. P. McCoy, as Special Disbursing Agent of the United States, was authorized to draw checks upon the defendant bank and to launch them in commercial channels, then the United States occupies the same relation to such checks as an individual would under such circumstances, and the Government in such a case is responsible for the act of its agent in the same way that a private individual would be responsible for the act of its agent. If the Government clothed McCoy with the power to issue negotiable paper, then such negotiable paper became a bill of exchange, takes upon itself all the attributes of commercial paper generally, and the Government is bound by the same rules regulating commercial paper that operates upon an individual who issues negotiable paper.

IV.

It is a general rule that banks are required to know at their peril the genuineness of the signature of the payee of a check or draft, and if the checks in question had been made payable to the order of real persons then this rule would be controlling. But such is not the case with regard to fictitious payees. In the case of fictitious payees a bank is authorized

to pay the amount of the check or draft to the holder who presents same for payment, and is released and discharged, under the law regulating negotiable paper, from any duty to even investigate the genuineness of the endorsement of the payee. The holder of such an instrument would have the right to maintain an action upon such check in his own name as the [142] holder thereof, regardless of the fact that the check may have been payable to a specifically named payee, if such payee was known by the party who drew the instrument to be a nonexisting person at the time it was drawn.

V.

If you find from the evidence in this case that the defendant was guilty of negligence in paying the checks in question, and that the plaintiff was also guilty of negligence in failing to discover the forgeries or fraud and in not promptly notifying the defendant of the discovery of the forgeries or fraud, or, in other words, that both parties were guilty of negligence, then I instruct you that the law leaves the parties where they are, and compels the loss to lie where it falls. Where a loss has been suffered by reason of mutual neglect by plaintiff and defendant, the question always arises as to who shall bear that loss. Where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case this rule leaves the loss upon the plaintiff and your verdict must be for the defendant, if you find that the defendant was guilty of negligence in paying the checks

and that the plaintiff was guilty of negligence in not discovering the fraud promptly and in not promptly notifying the defendant of the discovery of the fraud, and in not making a prompt demand for the repayment of the money claimed by it to have been paid out wrongfully and negligently by the defendant.

VI.

If you find from the evidence in this case that the defendant at stated intervals—monthly or quarterly—rendered statements of the condition and status of the McCoy account in [143] its bank to the plaintiff, and also sent to the plaintiff at such stated intervals the paid checks, and that the plaintiff has retained said checks and has not returned them to the defendant, then I instruct you that the account between the plaintiff and the defendant became stated. The rule between individuals having mutual running accounts is that an account stated becomes an account proved if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. And if you find from the evidence that these statements of account were rendered by the defendant to the plaintiff and that no objection was made to them by the plaintiff within a reasonable time after the discovery of the fraud on the part of McCoy, or after it should have discovered the fraud by the exercise of reasonable diligence, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant.

VII.

It appears from the uncontradicted testimony in this case that all of the checks in controversy were presented to the defendant for payment by other banks, and the defendant became obligated by business rules and banking rules to promptly report any ground for rejecting the checks or for reclaiming the amounts paid thereon.

It also appears that the defendant had mutual running accounts with such other banks and that mutual accounts were rendered by the defendant bank to such other banks who forwarded such checks for collection, and that the accounts between said defendant and such other banks became stated, and if there was no objection made by the defendant to the accounts of such other banks, the account would become proved and the defendant would [144] not be able to recover from such other banks the amount of money that it had paid to them on account of these checks, unless the defendant notified such other banks with reasonable promptness of the fraud and forgeries; and the reason for this rule is that by the delay of the defendant bank in notifying such other banks promptly of the fraud, such other banks would be precluded from their recourse over against the parties from whom they received the checks in question.

VIII.

It is contended by the plaintiff in this case that under the regulations of one of the executive departments of the United States Government, the defendant was only authorized to pay checks drawn

by McCoy payable to a particular person for an obligation owing to such person by the United States; that the defendant had knowledge, or was charged with knowledge, of such departmental regulation.

Even though it be true that the defendant bank had knowledge of such departmental regulation, still such fact, standing alone, would not justify a verdict at your hands in favor of the plaintiff, for the reason that this is a controversy growing out of commercial paper. The rights of the banks who acquired the ownership of these checks and presented them to the defendant bank for payment must be considered. Such presenting banks would not be charged with the knowledge of the defendant bank of such departmental regulation. When McCoy put such checks into circulation as commercial paper, the forwarding banks had a legal right to assume that they possessed all of the attributes of ordinary negotiable paper, and they would take the checks free of any specific instructions that might have been given by any department of the Government to the defendant bank undertaking to place a limitation upon their method of payment. [145]

It would be inequitable and unconscionable for the Government to authorize its agent, McCoy, to put into circulation negotiable paper which would be valid in the hands of an innocent holder, and which would give such innocent holder a right to enforce payment against the defendant bank and at the same time place such limitations upon the apparent authority of its agent as would render the defendant

bank liable to the United States if it paid such innocent holder the amount of the negotiable paper held by such holder.

Carrying this reasoning to its final analysis the legal effect of the plaintiff's position in this case is tantamount to the Government saying: "We have authorized McCoy to put into commercial channels paper possessing all of the characteristics and attributes of commercial negotiable paper, and an innocent holder of such paper can compel the defendant bank to pay the amount thereof to such holder; but if the defendant bank does pay the amount of such paper to the holder thereof, it is nevertheless liable to the Government because it did perform its duty in paying to such innocent holder the amount of the obligation represented by the paper in question." And if you find from the evidence that the plaintiff authorized McCoy to draw the checks in question, then the plaintiff cannot recover in this action and your verdict must be for the defendant.

IX.

If you find from the evidence in this case that the plaintiff discovered the fraud of McCoy in connection with the checks in question on the first of September, 1909, and failed to notify the defendant of the discovery of such forgeries and fraud until the 5th of March, 1910, then I instruct you that such delay in giving the notice of the forgeries and fraud and making the demand for the repayment was an unreasonable delay, and unexplained constitutes such negligence on the part of the plaintiff as [146] precludes its recovery in this action, unless you fur-

ther find that under all the facts and circumstances of this case such delay between the discovery of the fraud on or about the first of September, 1909, and the giving of the notice thereof and making the demand on the defendant on March 5th, 1910, was excusable on the part of the plaintiff.

XI.

If you find from the evidence in this case that the plaintiff failed to discover the fraud practiced by McCoy in issuing the checks in question through any lack of diligence on its part, or that it failed after the discovery of the fraud to promptly notify the defendant of its discovery, and to demand the return of the money out of which it claims to have been defrauded, with reasonable promptness, then I instruct you that the proof of actual damage to the defendant resulting from such delay or lack of diligence on the part of the plaintiff is not necessary to be shown by the defendant. The law presumes a damage, actual or potential. Proof of actual damage is not required. Proof of actual damage may not always be within the reach of the injured party, and, therefore, to confine the relief or remedy to cases of that sort falls far short of the actual grievance.

Notice, demand and return of the documents must be made within a reasonable time and any neglect would absolve the defendant from responsibility.

The same rule applies in a case of this kind as applies in the case of a failure on the part of the holder of negotiable paper to notify the endorsers thereon of its dishonor. A failure to protect a check or bill of exchange for nonpayment will release the

endorser and the endorser is not required to show [147] that he has been damaged actually by the failure to protest; the law in such a case presumes damage and such is the rule with regard to forged or fraudulent negotiable paper, such as is involved in this action; and if you find that the plaintiff negligently failed to discover the forgeries or failed to notify the defendant promptly after the discovery of the fraud, or failed to return the dishonored and fraudulent checks to the defendant immediately after the discovery of the fraud of McCoy, then I instruct you that the plaintiff cannot recover in this action, and your verdict must be for the defendant.

XII.

If you find from the evidence in this case that the plaintiff received the benefit of a portion of the money that McCoy succeeded in withdrawing from the defendant bank upon the checks in question, then I instruct you that, even though your verdict be for the plaintiff, you must deduct from the amount claimed by the plaintiff that portion of the fund which McCoy applied toward the payment of the legitimate obligations owing by the Government. [148]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

Petition for New Trial.

Comes now the National Bank of Commerce, defendant herein, by Messrs. Kerr & McCord, its attorneys, and moves the Court for an order granting a new trial in the above-entitled cause and vacating and setting aside the verdict and judgment filed and entered herein, upon the following grounds, to wit:

I.

Error in law occurring at the trial of said cause, then and there excepted to by the defendant herein, which error consisted of granting motion of plaintiff for a directed verdict against the defendant at the conclusion of the introduction of testimony, and in refusing to vacate and set aside the verdict of the jury rendered in favor of the plaintiff and against the defendant in the sum of Fifteen Thousand One Hundred Twenty-nine and $81/100$ Dollars (\$15,129.81), and interest at the rate of six per cent from the 5th day of March, A. D. 1910.

II.

Upon the ground of newly discovered evidence

material for the defendant and which the defendant could not with reasonable diligence have discovered and produced at the trial.

This petition is based upon the records and files [149] herein and upon the stenographer's notes of the proceedings taken at the trial and upon the affidavits of J. A. Swalwell and E. S. McCord attached hereto.

KERR & McCORD,
Attorneys for Defendant.

Received a copy of the within petition this ——
day of May, A. D. 1914.

_____,
Attorneys for Plaintiff. [150]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,
Defendant.

**Affidavit [of E. S. McCord in Support of Petition for
New Trial].**

State of Washington,
County of King,—ss.

E. S. McCord, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action and files this affidavit

in support of the petition of defendant for a new trial in the above-entitled action and particularly in support of that portion of the petition based on the ground of newly discovered evidence.

That since the trial of the above-entitled action this affiant ascertained that M. P. McCoy, as Special Disbursing Agent and Examiner of Surveys for the United States referred to in the complaint and in the checks mentioned in said complaint, has executed a fidelity bond to the United States, with a Surety Company as surety thereon, conditioned for the return of all moneys belonging to the United States that came into his custody as such Special Disbursing Agent and Examiner of Surveys; that until such time neither the petitioner nor this affiant, nor any of the officers of petitioner knew that a bond had been given by the said M. P. McCoy; that immediately on obtaining this information affiant sent a telegram to the Honorable [151] Wesley L. Jones, United States Senator for the State of Washington, at Washington, D. C., requesting the said Jones to ascertain from the Interior Department at Washington whether the said McCoy had furnished a bond with a Surety Company as surety, and whether or not the Government had collected the amount of said bond from the surety of the said McCoy, and how much had been collected and when the collection was made. Said telegram was sent to the said Jones on the 25th day of May, 1914; that on the 26th day of May, 1914, affiant received a telegram from the said Jones from Washington, D. C., stating that the said M. P. McCoy, as such Agent of the United States,

had given a bond for \$3,000 to the United States of America for the return of the moneys that came into his hands as such agent belonging to the United States of America, and that the Surety Company had paid the amount of the bond to the United States, and that the amount so paid upon said bond was the sum of \$3,000; that said Jones acquired this information from the records and files in the Department of the Interior at Washington, D. C., and from the officials and employees of such Department; that affiant has not had an opportunity since the receipt of said telegram, to procure certified copies of the records of the Department of the Interior, but affiant alleges that the records of such Interior Department show that the sum of \$3,000 was paid by the surety of the said McCoy to apply upon the loss caused by the alleged defalcation of the said McCoy, and in part payment of the sums of money claimed by the plaintiff to have been embezzled by the said McCoy, and that said sum was applied upon the amount of the checks described in the complaint and in part payment of the amount of money claimed by the plaintiff to have been embezzled by the said McCoy, and in part payment of the amount sued upon by the plaintiff in the above-entitled action; that the said sum was paid by the said [152] surety of McCoy to the United States, with full knowledge on the part of the United States of all of the facts and circumstances set forth in the complaint, and that the action on the part of the United States in collecting said sum of three thousand dollars from the Surety Company amounted to a recognition on the part of the plaintiff

that the money sought to be recovered in this action was the money of the United States at the time of the embezzlement of McCoy, and that the plaintiff by collecting said sum from McCoy's surety recognized that the money so claimed to have been embezzled by McCoy belonged to the United States, and did not belong to the National Bank of Commerce at the time of such embezzlement.

That said evidence can be produced at a new trial of this action and is material to the issues set forth herein and conclusively establishes defendant's third affirmative defense to the effect that the United States, with full knowledge of all the facts, recognized, ratified and approved the action of the defendant in paying over the money represented by the checks in the complaint to the said M. P. McCoy, and that such payment amounted to an election on the part of the plaintiff to treat and consider the money claimed to have been embezzled by McCoy, as the money of the United States and not of the defendant.

That neither the defendant nor affiant could, with reasonable diligence, have produced the above evidence of payment by the Surety Company to the United States of said sum of \$3,000; that the records in the office of the Interior Department and of the Treasury Department of the United States of America, disclose that the United States of America, plaintiff above named, has collected from M. P. McCoy's official bond, the sum of \$3,000 for the embezzlement of the identical funds described and set forth in the complaint, and for the recovery of [153] which this action is being prosecuted; that

the said evidence is material in support of defendant's plea of payment and shows conclusively a payment of at least \$3,000 upon the amount sued upon; that upon a new trial of this action defendant will be able to produce documentary evidence and evidence of the officials of the Interior Department and Treasury Department of the United States; that the plaintiff in the year 1910, and long after the arrest and conviction of the said M. P. McCoy, charged with embezzling funds of the United States, collected from the surety on the official bond of the said M. P. McCoy the said sum of \$3,000, and that the same was in payment by the Surety Company of a part of the money sued for in this action, and will be able to establish by such evidence that the Government ratified the action of the defendant in paying out the money through the checks set forth in the complaint to the said McCoy, and that such payment by the Surety Company constituted an estoppel against the right of plaintiff to maintain this action; that neither the defendant nor this affiant knew that such evidence existed at the time of the trial of this action, and not knowing of its existence they could not have discovered it in time to produce it at the former trial of this action.

E. S. McCORD.

Subscribed and sworn to before me this 26th day of May, A. D. 1914.

[Seal]

S. H. KERR,

Notary Public in and for the State of Washington,
Residing at Seattle. [154]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

**Affidavit [of J. A. Swalwell in Support of Petition
for New Trial].**

State of Washington,
County of King,—ss.

J. A. Swalwell, being first duly sworn, on oath deposes and says: That he is the vice-president of the National Bank of Commerce, the defendant in the above-entitled action; that he has read the affidavit of E. S. McCord attached hereto, and that the facts set forth therein are true to the best of his knowledge and belief.

J. A. SWALWELL.

Subscribed and sworn to before me this 26th day of May, A. D. 1914.

[Seal]

S. H. KERR,

Notary Public in and for the State of Washington,
Residing at Seattle. [155]

[Indorsed]: No. 1933—C. In the District Court of the United States for the Western District of Washington, Northern Division. United States of Amer-

ica, Plaintiff, vs. The National Bank of Commerce, a Corporation, Defendant. Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [156]

United States District Court, Western District of Washington, Northern Division.

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE,

Defendant.

Affidavit of E. S. McCord [in Support of Petition for New Trial].

State of Washington,
County of King,—ss.

E. S. McCord, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant above named; that the said M. P. McCoy while acting as Special Disbursing Agent and Examiner of Surveys, executed a bond to the United States with the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety; that the full penalty of the bond in the sum of Three Thousand Dollars was paid by the Surety Company to the United States of America and said Company was released from liability upon said bond.

That during the years 1907, 1908 and 1909, said McCoy was employed at a salary, by the United

States, of \$270 per month, and that said sum of \$270 per month was paid by the United States to said McCoy monthly during said period; that after the discovery of the fraud perpetrated by the said McCoy heretofore set forth in the affidavits and in the records in this case, the United States of America charged back to McCoy on account of salary payment the sum of \$3,000, and then applied on the entire [157] account of McCoy with the Government the said sum of \$3,000; that the bond given by the said McCoy was for the faithful performance of his duties as Disbursing Agent and Examiner of Surveys and for the accounting to the Government of all the moneys that came into his hands as such agent; that the said bond did not provide that the surety should be responsible for any salary paid to the said McCoy by the United States which the said McCoy did not earn, and it is claimed by the plaintiff that McCoy did not earn his salary of \$270, and because of the failure of consideration they charge his account with the amount of said salary in the sum of \$3,000, which had theretofore been credited to his account; that the charge of said sum of \$3,000 to McCoy's account was not a charge for which the surety upon the bond was in any way responsible and that it was improperly and wrongfully charged to McCoy's account, and it was the duty of plaintiff to have applied the \$3,000 against the amount of money that the said McCoy wrongfully appropriated through the defendant bank. Affiant makes this affidavit on information and belief.

E. S. McCORD.

That to the best of his knowledge, information and belief, the total amount of the indebtedness of Marion P. McCoy was \$19,655.54; that there was repaid on December 23, 1909, by warrant No. 665, \$1,434.00 and by warrant No. 780, dated January 28, 1910, from the United States Fidelity and Guaranty Company, \$3,000, making a total credit of \$4,434, and leaving a balance due the United States of \$15,221.54.

That the said Marion P. McCoy was credited by the Treasury Department with the amounts above set forth prior to February 9, 1910, and the above-entitled action was commenced on December 22, 1910, for the sum of \$15,121.81, a sum less than the balance due on McCoy's account as above set forth, and amount due on forged checks set out in complaint.

[160]

This affidavit is based upon Certificate of Settlement No. 3166 of the Treasury Department, certified to by the Deputy Auditor of the Interior Department, and on a certified copy of a letter of June 8, 1914, from F. A. Reeve, Acting Solicitor of the Treasury.

G. P. FISHBURNE.

Subscribed and sworn to before me this 16th day of June, 1914.

[Seal]

FRANK L. CROSBY,

Clerk U. S. Dist. Court, Western Dist. of Washington. [161]

[Indorsed]: No. 1933-C. In the District Court of the United States for the Western District of Washington. United States of America, Plaintiff, vs. National Bank of Commerce, Defendant. Affidavit of G. P. Fishburne. Filed in the U. S. District Court, Western Dist. of Washington. June 16, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [162]

STATEMENT OF ACCOUNT AND CERTIFICATE OF SETTLEMENT
Marion P. McCoy, Examiner of Surveys and Special Disbursing Agent, General Land
Office in Account Current with the United States from September 13, 1905, to Janu-
ary 31, 1910, under bond dated September 5, 1905.

Certificate No. 3166.

Interior Civil Fiscal Officers

Total.

Supplemental from April 21, 1908, to March 31, 1909.
Account for Period Ended January 31, 1910.

Surveying
the Public
Lands, 1908.

Surveying
the Public
Lands, 1909.

Surveying
the Public
Lands, 1910.

4,466.75

4,300.00

1,500.00
1,400.00
1,400.00

2,055.54

8,833.25

19,655.54

DEBITS.

4,466.75

Balance due the United States, Certificate No. 2800, dated
Nov. 24, 1909,

Accountable warrants:
Warrant No. 82, dated July 6, 1909,
Warrant No. 429, dated July 24, 1909,
" " August 26, 1909,
" " 854,

Expenditures:
Disbursements, including salary, per diem allowance in
lieu of subsistence, and expenses of M. P. McCoy,
Examiner of Surveys, from April 21, 1908, to March
31, 1909, heretofore credited, now charged back and
disallowed under revision of accounts and differences
found by Comptroller of Treasury January 17, 1910,
as follows:

Disbursements, April 21, to June 30, 1908, Certificate No.
1711, charged back
" July 1 to December 31, 1908, Certificate
No. 1988, charged back,
" January 1 to March 31, 1909, Certificate
No. 2068, charged back,

2,055.54

7,587.85

1,245.40

13,300.00

\$2,055.54

4,300.00

Balance now due the officer, Total

CREDITS.

Balance due the officer, per Certificate No.

Treasury deposits: Repay

Warrant No. 665, dated December 23, 1909,

Warrant No. 780, dated January 28, 1910,

Balance now due the United States

Total

| | | |
|------------|-----------|-----------|
| 2,055.54 | 1,434.00 | 1,434.00 |
| \$— | 944.46 | 3,000.00 |
| \$2,055.54 | 12,355.54 | 15,221.54 |
| | 13,300.00 | 19,655.54 |

Treasury Department,

Office of the Auditor for the Interior Department,

Washington, February 9, 1910.

I certify, that I have examined and settled the account of Marion P. McCoy, Examiner of Surveys and Special Disbursing Agent, General Land Office, with the United States, from September 13, 1905, to January 31, 1910, under his official bond dated September 5, 1905, including all former balances and suspensions, and find a balance due the United States of fifteen thousand two hundred twenty-one dollars and fifty-four cents under the several appropriations and headings of account as stated above.

\$15,221.54

The Secretary of the Treasury,
Division of Bookkeeping and Warrants.
Office of the Secretary of the Treasury
Division of Bookkeeping and Warrants

H. C. SHOBER,
Auditor,
By _____, Deputy Auditor.

Entered in Ledger No. _____, page 128, 2/10/10, 19____. R.

[163]

No. 3166
Interior Civil Fiscal Officers
Certificate
of the

Auditor for the Interior Dept. on the account of Marion
P. McCoy, Examiner of Surveys and Special Disb.
Agent, for the period ended January 31, 1910.
Settled Feby. 9, 1910.

Feb. 10, 1910.

Div. of Bookkeeping and Warrants Posted by

Reg. Aud. Settlements

Personal Ledger

Transfer of Funds Register

Pay Register

Expenditures Ledger

Repay Register

Revenue Register

Revenue Ledgers

(Office Auditor Interior Dept. March 3, 1910.

A. M. 9/12/2/4 P. M.

N. Rice
E. C. H.
Steele
H. C.

[163½]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a
Corporation,

Defendant.

**Affidavit of G. P. Fishburne [in Opposition to
Petition for New Trial].**

Comes now the plaintiff in the above-entitled action, and reserving its right to object to the materiality of the evidence set forth by the affidavit of E. S. McCord as a ground for a new trial, makes the following affidavit:

United States of America,
Western District of Washington,
Northern Division,—ss.

G. P. Fishburne, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action and files this affidavit to deny and explain the statements of E. S. McCord, without waiving his rights to object to the affidavit of E. S. McCord on the ground of its being incompetent, irrelevant and immaterial. That the amount collected from the surety on the bond of M. P. McCoy was credited on other indebtedness, not involved in the above-entitled action, and that to the best of the knowledge, information and belief of

affiant there has been no money whatever paid by the surety of the said McCoy on the amount sued upon in this action, or [164] any part thereof, and that the only money collected from the surety of McCoy was credited on an indebtedness of the said McCoy which is not involved in the above-entitled action.

That to the best of the knowledge, information and belief of this affiant neither E. S. McCord nor the persons from whom he received any information knew on what indebtedness the money paid by the surety company was applied, and that the affidavit of E. S. McCord is based on surmise and through not knowing of other indebtedness that had been incurred by McCoy to the plaintiff herein.

This affidavit is based on a telegram from F. A. Reeves, Acting Solicitor, Washington, D. C.

G. P. FISHBURNE.

Subscribed and sworn to before me this 26th day of June, 1914.

ED M. LAKIN,
Deputy Clerk U. S. Dist. Court, Western Dist. of
Washington. [165]

[Indorsed]: No. 1933-C. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. National Bank of Commerce, Defendant. Affidavit of G. P. Fishburne. Filed in the U. S. District Court, Western Dist. of Washington. June 26, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [166]

[Indorsed]: No. 1933-C. In the District Court of the United States for the Western District of Washington. United States of America, Plaintiff, vs. National Bank of Commerce, Defendant. Affidavit of G. P. Fishburne. Filed in the U. S. District Court, Western Dist. of Washington. Jun. 16, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [167]

[Affidavit of Rich. D. Lang.]

State of Maryland,
City of Baltimore,—ss.

Richard D. Lang, being duly sworn, deposes and says: That he is Vice-president of the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation engaged in the general business of executing surety bonds. That the records of this company show that it did on or about the 5th day of September, 1905, execute as surety a bond running to the United States with Marion P. McCoy as principal, and conditioned upon the faithful performance of the duties of the said McCoy as Special Disbursing Agent and Examiner of Surveys for the United States in the States of Washington, Montana, and Idaho, said bond being in the penalty of Three Thousand Dollars (\$3,000).

Affiant further says that on or about the 16th day of November, 1909, the said United States notified this company that the said McCoy had defaulted, and called upon this company to reimburse the said United States for said defalcation of said McCoy to the amount of the penalty of said bond.

Affiant further says that the records of this company show that it did on or about the 5th day of January, 1910, pay to the said United States in full settlement of its liability under said bond aforementioned the sum of Three Thousand Dollars (\$3,000), for which it holds the receipt and release of the said United States of and from any liability against it on account of said bond.

RICHD. D. LANG,
Vice-president.

Subscribed and sworn to before me this 8th day of June, 1914.

A. S. PATRICK,
Notary Public. [168]

State of Maryland, Baltimore City,—Set:

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, do hereby certify, that A. D. Patrick, Esquire, before whom the annexed affidavit was made, and who has hereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, residing in said City and State, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments, or proofs of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City,

the same being a Court of Record, this 8 day of June, 1914.

[Seal]

STEPHEN C. LITTLE,

Clerk of the Superior Court of Baltimore City.

[169]

[Indorsed]: No. 1933-C. United States of America vs. National Bank of Commerce. Affidavit of Richard D. Lang. Filed in the U. S. District Court, Western Dist. of Washington. June 22, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[170]

[Affidavit of Abner H. Ferguson.]

District of Columbia, to wit:

Abner H. Ferguson, being first duly sworn, deposes and says: That he is a member of the bar of the City of Washington, District of Columbia, and is associated in practice with the firm of Ellis & Donaldson, of the same place.

Affiant further says that he has this day made an examination of certain records in the office of the Interior Department of the United States relating to the accounts between the United States and one, M. P. McCoy, lately in the employment of the Government in the capacity of a special disbursing agent and examiner of surveys for the United States in the States of Washington, Montana and Idaho, with offices in the City of Seattle, State of Washington.

Affiant further says that among the records so examined by him was the statement of the settlement of the account between the United States and the said M. P. McCoy, which said statement was made by the

officials or agents of the said United States, and purports to cover the period beginning September 13th, 1905, and ending January 3d, 1910; he further says upon information obtained from agents and employees of the United States at the said Interior Department that the Government claimed no defalcation on the part of the said McCoy until the period embraced in the fiscal year 1908, and that for said year said statement shows that the said McCoy wrongfully obtained from the United States the sum of Two Thousand and Fifty-five Dollars and Fifty-four Cents (\$2,055.54) of moneys belonging to the United States, which were deposited to the credit of the said McCoy in the National Bank of Commerce of Seattle, Washington. Affiant further says that said statement shows that for the fiscal year 1909, and at the end of said fiscal year the said McCoy was charged with the sum of [171] Four Thousand Four Hundred and Sixty-six Dollars and Seventy-five Cents (\$4,466.75), being the difference between the amount which had been placed to his credit as such disbursing agent, and the amounts which he claimed to have expended, and for which he had been given credit; said statement further shows that in addition to said sum last mentioned the said McCoy was charged with the sum of Seven Thousand Five Hundred and Eighty-seven Dollars and Eighty-five Cents (\$7,587.85), being the amount which the United States claimed the said McCoy had improperly obtained during the second and third quarter of said fiscal year of 1909, and he is further charged with the sum of One Thousand Two Hundred and

Forty-five Dollars and Ninety Cents (\$1,245.90), according to said statement, which is the amount the Government claimed he had improperly obtained during the last quarter of the fiscal year 1909, which makes a total amount claimed by said statement as due from said McCoy to the United States for said fiscal year of 1909 of Thirteen Thousand Three Hundred Dollars (\$13,300).

Said statement further shows that during the fiscal year 1910, and up until he was removed from office the Government had placed to his credit as such special disbursing agent the sum of Four Thousand Three Hundred Dollars (\$4,300), and that there was on deposit in the said National Bank of Commerce at Seattle to the credit of said McCoy, as such special disbursing agent at the time of his removal the sum of One Thousand Four Hundred and Thirty-four Dollars (\$1,434), which leaves a balance, in accordance with said statement, of Two Thousand Eight Hundred and Sixty-six Dollars (\$2,866), which the Government claimed had been improperly obtained from it by said McCoy.

Affiant further says that in accordance with the [172] said statement the said McCoy was indebted to the United States in the sum of Two Thousand and Fifty-five Dollars and Fifty-four Cents (\$2,055.54) for the fiscal year 1908, in the sum of Thirteen Thousand Three Hundred Dollars (\$13,300) for the fiscal year 1909, and in the sum of Two Thousand Eight Hundred and Sixty-six Dollars (\$2,866) for the year 1910, making a total indebtedness to it of Eighteen Thousand and Two Hundred and Twenty-one Dol-

lars and Fifty-four Cents (\$18,221.54).

Said statement further shows that the United States received on or about the 28th day of January, 1910, the sum of Three Thousand Dollars (\$3,000), which is represented to have been received by the Government from the United States Fidelity & Guaranty Company of Maryland, which was the surety on the bond given by the said McCoy to insure the faithful performance of his duties as such special disbursing agent, said sum of Three Thousand Dollars (\$3,000) so received from the surety on the bond of the said McCoy was applied by the United States as follows: The sum of Two Thousand and Fifty-five Dollars and Fifty-four Cents (\$2,055.54) was applied in payment of the amount claimed to be due from McCoy to the United States for the fiscal year 1908, as hereinbefore stated, and the sum of Nine Hundred and Forty-four Dollars and Forty-six Cents (\$944.46) was applied upon the indebtedness of Thirteen Thousand Three Hundred Dollars (\$13,300) claimed to be due for the fiscal year 1909, leaving a balance for said fiscal year as claimed by the United States from said McCoy of Twelve Thousand Three Hundred and Fifty-five Dollars and Fifty-four Cents (\$12,355.54).

Said statement further shows that the net indebtedness due from McCoy to the United States, after deducting the said sum of Three Thousand Dollars (\$3,000) from the total [173] indebtedness, as above set forth, is the sum of Fifteen Thousand Two

Hundred and Twenty-one Dollars and Fifty-four Cents (\$15,221.54).

ABNER H. FERGUSON.

Subscribed and sworn to before me this 8th day of June, 1914.

[Seal]

ANNA M. BOSSE,
Notary Public.

District of Columbia,—ss. No. 4297.

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, the same being a Court of Record, having by law a seal, do hereby certify that Anna M. Bosse, before whom the annexed instrument in writing was executed, and whose name is subscribed thereto, was at the time of signing the same a notary public in and for the said District, residing therein, duly commissioned and sworn, and authorized by the laws of said District to take the acknowledgment and proof of deeds or conveyances of land, tenements, or hereditaments, and other instruments in writing, to be recorded in said District, and to administer oaths; and that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said instrument and impression of seal thereon are genuine.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Washington, D. C., the 9th day of June, A. D. 1914.

JOHN R. YOUNG,
Clerk. [174]

[Indorsed]: No. 1933-C. United States of America vs. National Bank of Commerce. Filed in the

U. S. District Court, Western Dist. of Washington.
June 22, 1914. Frank L. Crosby, Clerk. By Ed M.
Lakin, Deputy. Affidavit of Abner H. Ferguson.
[175]

**[Certificate of Settlement and Allowance of Bill of
Exceptions.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a Cor-
poration,

Defendant.

BILL OF EXCEPTIONS.

For the purpose of making the foregoing matters a part of the record herein, I, Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington, Northern Division, now on this the 17th day of July, 1914, and within the term of this court during which the trial of the above-entitled cause was heard, do certify that this cause was tried before me, Judge of such court, with a jury, as aforesaid, and that the time for filing and serving said Bill of Exceptions having been enlarged and extended to and including the 18th day of July, A. D. 1914, by order of this Court, and pur-

suant to stipulation between the respective parties hereto.

And I do further certify that on this day came on for settlement and certification the Bill of Exceptions in this cause on the proposed Bill of Exceptions of defendant, counsel appearing for both parties, and the plaintiff by its attorney George P. Fishburne agreeing that said proposed Bill of Exceptions and exhibits therein set forth or referred to or hereto attached, be settled and certified as a true and correct Bill of Exceptions in said cause. [176]

And I further certify that having duly settled and hereby settling and allowing the foregoing Bill of Exceptions in said above-entitled action, do hereby certify the same and do hereby certify that this Bill of Exceptions and the exhibits marked Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J" and "K," and "L," therein set forth or referred to or hereto attached, together with defendant's identified Exhibit "1," offered at the trial and rejected by the Court, and the affidavits of E. S. McCord, Richard D. Lang and Abner H. Ferguson, offered in support of defendant's motion for a new trial, and the affidavits of George P. Fishburne, with the statement of account and certificate of settlement attached thereto, in opposition to said motion for a new trial, set forth or referred to or hereto attached, contains all the evidence, exhibits and other material facts, matters and proceedings in said cause not already a part of the record herein.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand with his title of office, at

196 *The National Bank of Commerce vs.*

Seattle, in the Northern Division of the Western District of Washington, this the 17th day of July, A. D. 1914.

JEREMIAH NETERER,
District Judge of the United States for the Western District of Washington.

O.K.—G. P. FISHBURNE.

Copy of within Bill of Exceptions received, and due service of same acknowledged this 6th day of July, 1914.

G. P. FISHBURNE,
Attorney for Plaintiff.

[Indorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [177]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1933.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,
Defendant.

Certificate [of U. S. District Judge Relative to Exhibits].

I, Jeremiah Neterer, Judge of the above-entitled court, do hereby certify that the foregoing accom-

panying documents are respectively Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," and "G," "H," "I," "J," "K," and "L," and Defendant's Exhibit "1," offered in evidence on the trial of the above-entitled cause and rejected by the Court, and are respectively the exhibits mentioned in the Bill of Exceptions herewith, and of which the said exhibits herewith form a part.

I further certify that the said original exhibits are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal of the above-entitled cause for the reason that the alleged forgery of the instruments constituting said Plaintiff's Exhibit "A" is an issue herein, and an inspection of said exhibit will be aidful to the said Circuit Court of Appeals, and for the further reason that said exhibits are difficult of reproduction.

Done in open court this the 17th day of July, A. D. 1914.

JEREMIAH NETERER,

United States District Judge, Western District of Washington.

O.K.—G. P. FISHBURNE,

Attorney for Plaintiff.

[Indorsed]: Certificate. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [178]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE OF
SEATTLE,

Defendant.

Assignment of Errors.

Comes now the defendant, the National Bank of Commerce of Seattle, and files the following Assignments of Error upon which it will rely for the prosecution of its Writ of Error in the above-entitled cause:

I.

The Court erred in granting plaintiff's motion for a directed verdict in favor of the plaintiff and against the defendant for the sum of \$15,129.81, with interest at the rate of 6% per annum from the 5th day of March, 1910, and in instructing and directing the jury to render a verdict in favor of the plaintiff and against the defendant in such amount or at all.

II.

The Court erred in receiving and filing such verdict so returned by the jury under the direction of the Court.

III.

The Court erred in entering final judgment in

favor of the plaintiff and against the defendant.

IV.

The Court erred in refusing to submit the case to the jury for its determination.

V.

The Court erred in refusing to submit the case to the jury and [179] to give defendant's first requested instruction, which instruction is as follows:

“The defendant in this case has alleged as an affirmative defense that the money sued for in this action, whether passing through the hands of fictitious payees or otherwise, was expended and used by M. P. McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States and in payment of claims that the said McCoy, as Special Examiner of Surveys, was authorized to make and pay on behalf of the United States.

If you find from the evidence in this case that the money sued upon in this action was withdrawn from the defendant bank and was expended by McCoy in payment of claims against the United States which McCoy as Special Examiner of Surveys was authorized to pay on behalf of the United States, then I instruct you that the plaintiff cannot recover in this action for the reason that the United States in such case would have suffered no damage.

I further instruct you that if you find that any portion of the money sued for in this action was so expended by the said McCoy in payment of

legitimate claims against the United States created by him and which he had a right to create, then I instruct you that the plaintiff cannot recover for such portion of the sum sued upon as was so expended by the said McCoy."

VI.

The Court erred in refusing to give defendant's second requested instruction, which instruction is as follows:

"It is contended by the plaintiff that there is due the United States from the defendant bank the sum of \$15,129.81, for moneys fraudulently withdrawn from the defendant bank by M. P. McCoy. The defendant, among other things, contends that in any event it is entitled to credit upon the sum of \$5,718, being the amount that the said McCoy was charged, in an indictment by the United States against him, with embezzling, upon which indictment the said M. P. McCoy was convicted and sentenced to the penitentiary for a term of years.

If you find from the evidence in this case that the said sum of \$5,718, referred to in said indictment and introduced in evidence in this case, constituted a portion of the \$15,129.81 sued for in this action, then I instruct you that the plaintiff cannot recover for the said sum of \$5,718, and such sum must be deducted from the total amount of \$15,129.81, for the reason that the judgment of conviction against the said M. P. McCoy [180] upon said indictment conclusively established the fact that such sum of

\$5,718 was the money and property of the United States, and by filing such indictment against the said McCoy for such sum and procuring a conviction thereon, the United States elected to treat said sum mentioned in said indictment as its own property, and thereby waived its claim for said sum against the defendant bank.”

VII.

The Court erred in refusing to give defendant's fourth requested instruction, which instruction is as follows:

“If you find from the evidence in this case that the proof of the allegations of plaintiff's complaint rest conclusively upon the testimony of M. P. McCoy, and if you find that the said M. P. McCoy has been convicted of a felony and sent to the penitentiary, and has served a term therein by reason of such conviction, then I instruct you that the said M. P. McCoy does not stand before you as an unimpeached witness, and it will be within your province to discredit his entire testimony, unless it is corroborated by other facts and circumstances in the case. The jury is not required to believe the testimony of any witness and particularly the testimony of a self-confessed and convicted felon, even though such testimony be uncontradicted, unless you believe that the testimony given by such witness be true. The fact that the testimony of a witness is not contradicted does not necessarily require you to believe such testimony; and if in this case you discredit and fail to believe the

testimony of the said M. P. McCoy, then I instruct you that you have a right to disregard his testimony altogether, except in so far as it may be corroborated by other facts and circumstances, or the evidence of other and credible witnesses in the case; and if you find from the evidence that you must disregard the testimony of the said McCoy, then I instruct you that your verdict must be for the defendant and against the plaintiff."

VIII.

The Court erred in refusing to give the fifth instruction requested by defendant, which instruction is as follows:

"Gentlemen of the jury, in weighing the testimony of the witness M. P. McCoy, I instruct you that you have a right to apply to his testimony all the usual tests that you apply in the conduct of the ordinary affairs of life; and I further instruct you that it is your duty to take into consideration the fact, if you find it to be a fact, that the said M. P. McCoy was in September, 1909, indicted for embezzlement, and upon such indictment was convicted of the crime of embezzlement. The law permits the defendant to introduce evidence showing, or tending to show, that any witness has been convicted of a felony for the purpose of affecting the credibility of such witness. If you find from the evidence in this case that M. P. McCoy has been convicted of a felony, you should take this fact into consideration in weighing his testimony and

in determining whether it is entitled to be believed by you; and if you find from such conviction of such felony that his testimony is unworthy of belief, and that his testimony is not corroborated by the facts and circumstances in this case, then I instruct you that the plaintiff cannot recover in this action, and your verdict must be for the defendant.” [181]

IX.

The Court erred in refusing to give the sixth instruction requested by defendant, which instruction is as follows:

“If you find from the evidence in this case that at the time the account was opened in the National Bank of Commerce by the United States in the name of M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, the plaintiff instructed the defendant bank to honor all checks drawn upon said account by the said M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, without limitation or condition, then I instruct you that defendant had the legal right to honor any checks so drawn by said McCoy regardless of the fact as to whether the payees were fictitious or otherwise, and if you find that such special instructions were given at the time of the opening of said account, then I instruct you that such special instructions would justify the defendant bank in failing, if it did fail, to follow the general instructions issued by the Treasury Department of the United States.”

X.

The Court erred in refusing to give the seventh instruction requested by defendant, which instruction is as follows:

“If you find from the evidence in this case that the United States, by its properly authorized officers, ratified and approved the actions of the said M. P. McCoy in drawing the checks referred to in the complaint, and ratified the action of the defendant bank in paying such checks, if you find that it did pay them, and in charging the amounts of such checks to the account of the defendant, then I instruct you that such ratification and approval by the United States would estop the plaintiff from a recovery in this action, and your verdict would be for the defendant.”

XI.

The Court erred in refusing to give the eighth instruction requested by defendant, which instruction is as follows:

“If you find from the evidence in this case that the said M. P. McCoy was authorized to expend such portion of the money deposited to his account in the defendant bank for legitimate purposes in connection with the expense attendant upon the examination of Surveys as he deemed expedient, then I instruct you that the burden rests upon the plaintiff in this case to establish by a preponderance of the evidence the fact that the money involved in this controversy was used by the said McCoy for purposes other

than his legitimate expenses; and the burden also rests upon the Government to establish by a preponderance of the evidence what portion of the amount involved in this controversy was improperly expended by the said McCoy." [182]

XII.

The Court erred in refusing to permit the defendant to introduce in evidence Defendant's Exhibit No. 1, which exhibit contained a transcript of the various statements furnished by the defendant at monthly intervals during the period of time the checks described in the complaint were issued by M. P. McCoy and paid by the defendant bank, and further showing the condition of the account of M. P. McCoy, Examiner of Surveys and Special Disbursing Agent in the defendant's bank.

XIII.

The Court erred in refusing to permit the witness R. S. Walker to testify as to the course of dealing between the National Bank of Commerce and the plaintiff relating to the transactions involved in the issuance and payment of the checks referred to in the complaint, and to testify as to facts and circumstances in support of defendant's third affirmative defense, i. e., that the plaintiff had ratified and approved the payment of said checks and had recognized that the money represented by said checks and claimed to have been appropriated by said McCoy was in fact the money and property of the plaintiff.

XIV.

The Court erred in refusing to permit the defendant to introduce evidence in support of its second

affirmative defense, as set forth in its answer.

XV.

The Court erred in sustaining the demurrer of the plaintiff to the first affirmative defense set forth in defendant's original answer.

XVI.

The Court erred in refusing to permit the defendant to [183] introduce evidence in support of its first affirmative defense set forth in its amended answer.

XVII.

The Court erred in denying defendant's motion for a new trial.

WHEREFORE, this defendant prays that the judgment of the United States District Court for the Western District of Washington, Northern Division, entered in the above-entitled cause, in favor of the plaintiff and against the defendant, be reversed.

KERR & McCORD,

Attorneys for Defendant.

Copy of within Assn. of Errors received and due service of same acknowledged this 17th day of July, 1914.

G. P. FISHBURNE,

Attorney for Plaintiff.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western District of Washington, Northern Division, July 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [184]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a Cor-
poration,

Defendant.

Petition for Writ of Error.

The defendant above named, the National Bank of Commerce of Seattle, feeling itself aggrieved by the judgment of the Court made and entered in this cause on the 25th day of May, A. D. 1914, comes now, by Kerr & McCord, its attorneys, and petitions this Court for an order allowing it to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and provided and that an order be made fixing the amount of security which defendant shall give and furnish upon said Writ of Error, conditioned as required by law as in cases where a supersedeas and stay of execution are desired.

Dated this 17th day of July, A. D. 1914.

KERR & McCORD,

Attorneys for Defendant.

Copy of within Petition for Writ of Error re-

ceived and due service of same acknowledged this 17th day of July, 1914.

G. P. FISHBURNE,
Attorney for Plaintiff.

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [185]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 1933-C.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corpora-
tion,

Defendant.

**Order Allowing Writ of Error and Fixing Amount of
Cost and Supersedeas Bond.**

Upon motion of Kerr & McCord, attorneys for the defendant, and upon the filing of a petition for a Writ of Error and an Assignment of Errors, it is

Ordered that a Writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein in favor of the plaintiff and against the defendant on the 25th day of May, A. D. 1914.

It is further ordered that upon the defendant, the National Bank of Commerce, filing with the clerk of this Court a good and sufficient bond in the sum of \$22,000, with good and sufficient security that the National Bank of Commerce, defendant, shall prosecute said Writ of Error to effect and answer all damages and costs, and pay the amount of the judgment including just damages for delay, together with costs and interest on the appeal if the defendant fails to make its plea good, said bond to be approved by the Court, and upon its approval all further proceedings, [186] in this court be hereby suspended and stayed until the determination of the Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Seattle, Wn., July 17, 1914.

JEREMIAH NETERER,

Judge.

O. K.—G. P. FISHBURNE.

Copy of within Order received and due service of same acknowledged this 17th day of July, 1914.

G. P. FISHBURNE,

Attorney for Plaintiff.

[Endorsed]: Order Allowing Writ and Fixing Amount of Cost and Supersedeas Bond. Filed in the U. S. District Court, Western District of Washington, Northern Division, July 17th, 1914. Frank L. Crosby, Clerk. Ed. M. Lakin, Deputy. [187]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,

Defendant.

Cost and Supersedeas Bond.

Know All Men by These Presents, that we, the National Bank of Commerce of Seattle, a corporation, as principal, and R. R. Spencer and M. Thomsen, as sureties, are held and firmly bound unto the United States of America, the plaintiff above-named, in the sum of Twenty-two Thousand Dollars (\$22,000) to be paid to the United States of America, for the payment of which well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our executors, administrators, representatives, successors and assigns firmly by these presents.

Sealed with our seals and dated this the 17th day of July, A. D. 1914.

Whereas, the defendant above-named has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to review and reverse the judgment entered by the above-named Court in the above-entitled case in favor of the plaintiff and against the defendant in the sum of \$15,-

129.81, with interest thereon from the 5th day of March, A. D. 1910, at the rate of 6% per annum, or \$3,832.88, making a total of \$18,962.69, together with a judgment for costs and disbursements in favor of the plaintiff and against the defendant in the sum of \$207.44.

Now, therefore, the condition of this obligation is such [188] that if the above-named defendant shall prosecute said Writ of Error to effect, the answer all damages and costs and pay the amount of said judgment, including just damages for delay, and costs and interest on the appeal, if the defendant shall fail to make its plea good, then this obligation shall be void; otherwise shall be and remain in full force and effect.

NATIONAL BANK OF COMMERCE OF
SEATTLE,

[Seal]

By G. F. CLARK,

Cashier.

R. R. SPENCER,

M. THOMSEN. [189]

State of Washington,

County of King,—ss.

R. R. Spencer and M. Thomsen, being first duly sworn, each for himself deposes and says:

That he is one of the sureties who executed the foregoing bond, and that he is worth the sum of \$22,000 over and above all his just debts and liabilities in statutory separate property situated in the State of Washington, not by law exempt from sale on execution, and that he is not a State, county, or city

official, nor an attorney or counselor at law.

R. R. SPENCER.

M. THOMSEN.

Subscribed and sworn to before me this the 17th day of July, A. D. 1914.

[Seal]

J. N. IVEY,

Notary Public in and for the State of Washington,
Residing at Seattle.

Approved: July 17, 1914.

JEREMIAH NETERER,

Judge.

O. K.—G. P. FISHBURNE.

[Endorsed]: Cost and Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [190]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1933—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,

Defendant.

Writ of Error (Copy).

United States of America,
Ninth Judicial Circuit,—ss.

To the Honorable Judge of the District Court of the
United States for the Western District of Wash-
ington; Greeting:

Because in the records and proceedings, as also in the rendition of the judgment upon a plea in said District Court before you, or some of you, between the United States of America, plaintiff, and The National Bank of Commerce, a corporation, defendant, a manifest error to the great damage of the said The National Bank of Commerce, as by its complaint, answer and assignment of errors appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, California, on the 16th day of August, 1914, next, in the said United States Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected the said United States Circuit Court of appeals may cause [191] further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD WHITE, Chief Justice of the Supreme Court of the United States, this the 17th day of July, 1914, and in the 139th year of the Independence of the United States.

JEREMIAH NETERER,

Judge.

[Seal] Attest: FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington.

Due and legal service of the within Writ of Error and receipt of a copy thereof is hereby admitted this the 17th day of July, 1914.

G. P. FISHBURNE,
Attorney for Plaintiff.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Writ of Error on the plaintiff herein by handing to and leaving a true and correct copy thereof with Hon. Clay Allen, United States District Attorney for the Western District of Washington, the attorney for the United States of America, plaintiff in the above-entitled cause, personally, at Seattle, Washington, in said District, on the —— day of July, A. D. 1914.

United States Marshal. [192]

[Indorsed]: No. 1933—C. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. The National Bank of Commerce, Defendant. Writ of Error. Filed in the

U. S. District Court, Western Dist. of Washington,
Northern Division. July 17, 1914. Frank L.
Crosby, Clerk. By Ed M. Lakin, Deputy. Kerr &
McCord, 1309-16 Hoge Building, Seattle, Wash., At-
torneys for Defendant. [193]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a Cor-
poration,

Defendant.

[Citation on Writ of Error (Copy).]

United States of America,
Ninth Judicial Circuit,—ss.

To the United States of America, and to Clay Allen,
United States District Attorney for the West-
ern District of Washington, and to G. P. Fish-
burne, Assistant United States District Attorney
for the Western District of Washington, North-
ern Division, Attorneys for the United States of
America: Greeting:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
at the City of San Francisco, in said Circuit, on the
16th day of August, A. D. 1914, pursuant to a Writ

of Error filed in the office of the Clerk of the District Court for the Western District of Washington, wherein the National Bank of Commerce of Seattle is plaintiff in error and defendant herein, and the United States of America is defendant in error and plaintiff herein, to show cause if any there be, why the judgment rendered against the plaintiff in error, as in said Writ of Error mentioned, [194] should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD WHITE,
Chief Justice of the Supreme Court of the United States, this the 17th day of July, A. D. 1914.

[Seal]

JEREMIAH NETERER,

Judge.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed citation on the United States of America, plaintiff in the above-entitled action, by handing to and leaving a true and correct copy thereof with the Hon. Clay Allen, United States District Attorney for the Western District of Washington, one of the attorneys for the plaintiff in the above-entitled cause, personally at Seattle, in said District, on the — day of July, A. D. 1914.

United States Marshal.

Copy of within Citation received and due service of same acknowledged this 17th day of July, 1914.

G. P. FISHBURNE,

Attorney for Plaintiff.

No. 1933—C. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff versus The National Bank of Commerce, Defendant. Citation in Error. Filed in the United States District Court Western District of Washington, July 17, 1914, Frank L. Crosby, Clerk, Ed Lakin, Deputy. Kerr & McCord, 1309-16 Hoge Building, Seattle, Washington, Attys. for Defendant. [195]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 1933—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a Corporation,

Defendant.

Order to Transmit Original Exhibits.

Now, on this, the 17th day of July, A. D. 1914, upon motion of Kerr & McCord, attorneys for the defendant, and for sufficient cause appearing, it is

ORDERED, that the plaintiff's original exhibits "A" and "G," which were introduced in evidence on the trial of the above-entitled cause, and also Plaintiff's Exhibits "B," "C," "D," "E," and "F," "G," "H," "I," "J," "K" and "L," which were offered in evidence, and Defendant's Exhibit "1," which was offered in evidence on the trial of the above-entitled

cause, and rejected by the Court, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the transcript of the record on appeal in this cause.

JEREMIAH NETERER,

District Judge of the United States for the Western District of Washington.

O. K.—G. P. FISHBURNE.

[Indorsed]: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western District of Washington, Northern Division. July 17, 1914. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy. [196]

United States District Court, Western District of Washington, Northern Division.

No. 1933—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,

Defendant.

Waiver [of Printing of Record Under Act of February 13, 1911, and Direction that Record be Printed by Clerk of Appellate Court].

We hereby waive the printing of the record in the above-entitled cause upon the Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, and request that the same be forwarded to

said Circuit Court of Appeals at San Francisco, with the request that it be printed there.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Waiver. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 21, 1914. Frank L. Crosby, Clerk. E. M. Lakin, Deputy. [197]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,

Defendant.

Praeceptum for Record.

To the Clerk of the Above-entitled Court:

You will please prepare at once transcript of the record in the above-entitled cause on Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, and forward the same to the clerk of that Court, including in the transcript the following papers necessary to the determination of the question to be passed on by said Circuit Court of Appeals:

1. Complaint filed December 22, 1910.
2. Answer filed February 11, 1911.

3. Plaintiff's demurrer to answer filed February 23, 1911.
4. Oral decision on demurrer to affirmative defense, filed September 21, 1911.
5. Order sustaining demurrer to first affirmative defense, and overruling as to second, filed September 21, 1911.
6. Amended answer, filed March 12, 1912.
7. Reply to amended answer, filed March 13, 1912.
8. Stipulation for extension of time for filing bill of exceptions and orders based thereon, filed and entered between the 19th day of May, 1914, and the 17th day of July, 1914. [198]
9. Bill of exceptions.
10. Certificate certifying Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," and "M," and Defendant's Exhibit "1."
11. Send plaintiff's original Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," and "M," and Defendant's Exhibit "1."
12. Assignment of Error, filed July 17th, 1914.
13. Petition for Writ of Error, filed July 17th, 1914.
14. Order allowing Writ of Error. Cost and super-sedeas bond.
15. Writ of Error filed July 17, 1914.
16. Citation with acceptance of service, filed July 17th, 1914.
17. Send original Writ of Error, as well as include copy in transcript.

18. Send original Citation, as well as include copy in transcript.
19. This Praeceptum.
20. All endorsements of any kind whatsoever appearing on any of the papers named in this praecipe.
21. The Judgment entered in favor of the plaintiff and against the defendant.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Praeceptum for Record. Filed in the U. S. District Court, Western District of Washington, Northern Division. July 21, 1914. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy. [199]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 1933.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIONAL BANK OF COMMERCE, a Corporation,
Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record, etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States

District Court, for the Western District of Washington, do hereby certify the 199 typewritten pages, numbered from 1 to 199, inclusive, to be a full, true, correct, and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same, together with the originals of Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K" and "L," and Defendant's Exhibit 1, which said original exhibits are transmitted herewith pursuant to the order of Court so directing, constitute the record on return to said Writ of Error from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred [200] and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as amended
by Sec. 6, Act of March 2, 1905) for mak-

| | |
|---|----------|
| ing record, certificate or return—467 | |
| folios at 30c..... | \$140.10 |
| Certificate of Clerk to transcript of record— | |
| 3 folios at 30c..... | .90 |
| Seal to said Certificate..... | .40 |
| Certificate of Clerk to Original Exhibits— | |
| 3 folios at 30c..... | .90 |
| Seal to said Certificate..... | .40 |
| | <hr/> |
| | \$142.70 |

I hereby certify that the above cost for preparing and certifying record amounting to \$142.70 has been paid to me by Messrs. Kerr & McCord, attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 4th day of August, 1914.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed M. Lakin,

Deputy. [201]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933—C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE,

Defendant.

Writ of Error [Original].

United States of America,

Ninth Judicial Circuit,—ss.

To the Honorable Judge of the District Court of the
United States for the Western District of Wash-
ington, Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment upon a plea in said
District Court before you, or some of you, between
the United States of America, Plaintiff, and The
National Bank of Commerce, a corporation, defend-
ant, a manifest error to the great damage of the
said The National Bank of Commerce, as by its com-
plaint, answer and assignment of error appears:

We being willing that error, if any hath been,
should be duly corrected and full and speedy justice
done to the parties aforesaid in that behalf, do com-
mand you if judgment be therein given, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things
concerning the same to the United States Circuit

Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, California, [202] on the 16th day of August, 1914, next, in the said United States Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD WHITE, Chief Justice of the Supreme Court of the United States, this the 17th day of July, 1914, and in the 139th year of the Independence of the United States.

JEREMIAH NETERER,

Judge.

[Seal] Attest: FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington.

Due and legal service of the within Writ of Error and receipt of a copy thereof is hereby admitted this the 17th day of July, 1914.

G. P. FISHBURNE,

Attorney for Plaintiff. [203]

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Writ of Error on the plaintiff herein by handing to and leaving a true and correct copy thereof with Hon. Clay Allen, United States District Attorney for the Western District of Washington, the

attorney for the United States of America, plaintiff in the above-entitled cause, personally, at Seattle, Washington, in said District, on the —— day of July, A. D. 1914.

United States Marshal. [204]

[Endorsed]: No. 1933-C. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. The National Bank of Commerce, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [205]

[Citation on Writ of Error (Original).]

*United States District Court, Western District of
Washington, Northern Division.*

No. 1933-C.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NATIONAL BANK OF COMMERCE, a
Corporation,

Defendant.

United States of America,
Ninth Judicial Circuit,—ss.

To the United States of America, and to CLAY
ALLEN, United States District Attorney for
the Western District of Washington, and to G.

P. FISHBURNE, Assistant United States District Attorney for the Western District of Washington, Northern Division, Attorneys for the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in said Circuit, on the 16th day of August, A. D. 1914, pursuant to a Writ of Error filed in the office of the Clerk of the District Court for the Western District of Washington, wherein The National Bank of Commerce of Seattle is plaintiff in error and defendant herein, and the United States of America is defendant in error and plaintiff herein, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said Writ of Error mentioned, [206] should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD WHITE, Chief Justice of the Supreme Court of the United States, this the 17th day of July, A. D. 1914.

[Seal]

JEREMIAH NETERER,
Judge.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed citation on the United States of America, plaintiff in the above-entitled action by handing to and leaving a true and correct copy thereof with the Hon. Clay Allen, United States District Attorney for the Western District of Washington, one of the at-

torneys for the plaintiff in the above-entitled cause, personally, at Seattle, in said District, on the —— day of July, A. D. 1914.

United States Marshal. [207]

Copy of within Citation received and due service of same acknowledged this 17th day of July, 1914.

G. P. FISHBURNE,
Attorney for Plaintiff.

[Endorsed]: No. 1933-C. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. The National Bank of Commerce, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jul. 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [208]

[Endorsed]: No. 2458. United States Circuit Court of Appeals for the Ninth Circuit. The National Bank of Commerce, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received and filed August 7, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

THE NATIONAL BANK OF COM-
MERCE, a Corporation,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2458

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

Brief of Plaintiff in Error

JAMES A. KERR,
EVAN S. McCORD,
Attorneys for Plaintiff in Error.

1309-16 Hoge Building
Seattle, Wn.

Filed

FEB 8 - 1915

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court
of Appeals

FOR THE
NINTH CIRCUIT

THE NATIONAL BANK OF COM-
MERCE, a Corporation,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2458

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

During the years 1907, 1908 and 1909 M. P. McCoy, was an Examiner of Surveys and Special Disbursing Agent for the United States with headquarters at Seattle. His duties required him to

go into the field in the States of Washington, Oregon, Idaho and Montana and examine public land surveys made by the Government, by running over about one-tenth of the lines run by surveyors in making the surveys to check up the work of the Government engineers.

The National Bank of Commerce of Seattle was the Government depository. The United States deposited with The National Bank of Commerce large sums of money at various times during the years named to the credit of M. P. McCoy, Examiner of Surveys and Special Disbursing Agent. McCoy was directed by a letter from the Treasury Department to leave his signature with the National Bank of Commerce; to draw checks upon that bank, and to sign the checks "M. P. McCoy, Examiner of Surveys and Special Disbursing Agent." This letter of instructions was shown by McCoy to the bank, and it contained no limitations upon his right to check against the account. His authority under the letter of instructions to draw the money upon his order was unlimited. (Record, pp. 82-83.)

Between October, 1907, and August 31st, 1909, upon checks so drawn, the bank paid out \$15,129.81.

The checks in question were drawn by McCoy to fictitious payees, known by him to be fictitious at the time the checks were drawn. He endorsed the names of the fictitious payees upon the checks and cause them, so endorsed, to be deposited in another bank and the proceeds placed to his credit under another fictitious name. The names he used in opening up accounts in other banks were F. M. Clark and J. D. King. (Record, p. 65.)

McCoy made weekly returns to the Government and monthly quarterly rendered vouchers for all of his expenditures. The bank every month rendered a statement to the Government and to McCoy as to the condition of the account, and quarterly returned to the Government all the vouchers it has paid upon McCoy's order. The Government was thus advised monthly and quarterly by the bank as to the status of the account and was given the names of the persons to whom the checks were drawn and paid, and the reports of McCoy, also made quarterly, gave in detail the expenditures and the purposes for which the expenditures were made.

All of the payees were fictitious and McCoy, the agent of the Government, systematically during all of the time above mentioned, attempted to de-

fraud the Government and was unfaithful to his trust. He was arrested in September, 1909, charged with embezzling \$5,718, the property of the United States (Record, p. 119). He was convicted and sentenced to the penitentiary; was paroled, and his is practically the sole testimony upon which the Government relies. The evidence shows that he had never been pardoned, nor had his civil rights been restored to him. The \$5,718 mentioned in the indictment is alleged by the Government to have been "then and there the property of the United States, and this sum as a part of the sum of \$15,129.81 for the recovery of which this action is prosecuted."

By indicting and convicting McCoy of embezzling these funds, described as the property of the United States, it necessarily follows that the Government ratified McCoy's action in drawing the money out of the bank in the manner he did. If McCoy did not embezzle the funds of the United States, then he was improperly convicted by the Government. If he was properly convicted by the Government then the Government ratified his action in drawing the checks and cannot in this proceeding be heard to contend that McCoy never

drew the money from the bank and that the bank still owes it to the Government.

During the time that McCoy was in the service of the Government, as before stated, he was required to give a bond to the United States conditioned upon his accounting to the Government for all moneys and property that came into his hands, and he did give such bond with the United States Fidelity & Guaranty Company as surety in the sum of \$3,000, and after his defalcations the Government collected the full face of the bond on January 28th, 1910, and instead of crediting the same upon the money McCoy had drawn out of the bank upon the fraudulent checks made payable to fictitious payees, the Government charged back to McCoy the sum of \$3,000 that had been paid out by the Government on account of salary, and then applied on the salary the \$3,000 collected from the Surety Company. (Record, pp. 178-193). This the defendant did not discover until after the trial. But the whole matter was brought into the case upon the motion for a new trial. No credit was given to the bank either for the amount of \$5,718 mentioned in the indictment or for the \$3,000 collected from the Surety Company.

During the period that the checks in question were drawn McCoy had honestly performed certain work for the Government in the examination of surveys and had expended honestly for the Government from \$1,000 to \$4,000 (Record, pp. 63, 78, 79, 81), and the expenditures in this amount were paid from the money McCoy fraudulently had in his possession. All the checks drawn upon the defendant bank bore the genuine signature of McCoy in whose name the deposit was made.

The Government failed to make any investigation or inquiry as to the accounts of its agent from 1907, when the frauds commenced, until August, 1909; failed to ascertain, as it could easily have done, that McCoy was acting fraudulently, and that he was not doing the work nor expending the money that he represented he was doing, when a slight inquiry would have disclosed the fact and prevented its continuance, and would have prevented the loss that has been sustained by some one through the negligence of the Government and through the fraud of its agent. The plaintiff not only failed to discover the forgeries or notify the bank of any irregularity in the accounts, but failed to make any demand for the money until six months after

the forgeries were discovered. The failure of the Government to examine the returns made by the bank and to report errors in time was the cause of the successful practice or continuance of the frauds, and was necessarily detrimental to the defendant. The injury could not have occurred had the Government performed its duty and examined the returns and verified their truthfulness.

In the amended answer to the complaint the defendant, after denying and admitting certain allegations thereof, interposed three defenses as follows:

"1. That the deposits so made by the plaintiff with the defendant in favor of M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor, and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Examiner of Surveys

and Special Disbursing Agent, and that monthly statements were rendered to plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of said McCoy and upon the rendition of statements of his account to have examined said account and to have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had been promptly made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy the defendant is precluded from asserting any claim that it may have had against the various banks which forwarded the checks in question to the defendant for payment, and that by reason of the plaintiff's

failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

2. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy as Examiner of Surveys, was authorized to make and pay on behalf of the United States.

3. That subsequent to the issuance of the checks described in the complaint and their payment by the defendant, the plaintiff, with full knowledge of the facts, ratified and approved the action of M. P. McCoy in drawing such checks in the way in which they were drawn, and the action of the defendant in paying them and charging the amounts thereof to the account of the plaintiff, carried on the books of the defendant in the name of M. P. McCoy as Examiner of Surveys and Special Disbursing Agent."

The third affirmative defense was interposed at the trial by permission of the Court but in the printed record the third defense of ratification does not seem to have been included. However, there can be no question of the defense having been made. Reference to it is specifically set forth on pages 150 and

175 of the record. The plaintiff in its reply denied the allegations of the third affirmative defense hereinbefore set forth. After the introduction of the testimony the Court, upon the motion of the plaintiff instructed the jury to bring in a verdict for the full amount prayed for in the complaint and refused to submit to the jury any question whatsoever, and refused to submit to the jury, under proper instructions, particularly the questions:

First: The defense set up by the defendant that \$4,000 of the money withdrawn from the bank was actually honestly used by McCoy in payment of the legitimate expenses connected with the examination of surveys, which expenses McCoy had the right to incur and pay.

Second: As to the defense made by the defendant that the Government had been paid \$3,000 by McCoy's surety, and had failed to credit the defendant with this sum.

Third: As to the defense that the Government had ratified McCoy's action in withdrawing from the defendant bank the sum of \$5,718, which the Government alleged in the indictment against McCoy was the money of the United States.

The defendant also pleaded in its amended

answer the statute of the State of Washington which provides that when a bank renders a statement of account to a depositor such depositor must, within sixty days notify the bank of any error or forgery, and if the depositor fails to so notify the bank within such time, no suit can be prosecuted. The demurrer to this defense was sustained.

ASSIGNMENTS OF ERROR.

I.

The Court erred in granting plaintiff's motion for a directed verdict. (Record, p. 154.)

II.

The Court erred in receiving and filing such verdict. (Record, p. 154.)

III.

The Court erred in entering final judgment in favor of the plaintiff. (Record, p. 31.)

IV.

The Court erred in refusing to submit the case to the jury for its determination.

V.

The Court erred in refusing to submit the case to the jury and to give defendant's first requested instruction. (Record, p. 201.)

VI.

The Court erred in refusing to give defendant's fifth requested instruction. (Record, p. 202.)

VII.

The Court erred in refusing to give defendant's sixth requested instruction. (Record, p. 203.)

VIII.

The Court erred in refusing to give defendant's seventh requested instruction. (Record, p. 204.)

IX.

The Court erred in refusing to give defendant's eighth requested instruction. (Record, p. 204.)

X.

The Court erred in refusing to permit the defendant to introduce in evidence defendant's offered Exhibit No. 1, which exhibit contained a transcript of the various statements furnished by the defendant at monthly intervals during the period the checks described in the complaint were issued by McCoy and paid by the defendant bank, and showed the condition of the account of McCoy with defendant's bank. (Record, p. 205.)

XI.

The Court erred in refusing to permit the witness Walker to testify as to the course of dealing between the bank and the Government with reference to this account and to show the ratification of the action of the bank in paying McCoy's checks. (Record, p. 205.)

XII.

The Court erred in refusing to permit defendant to introduce evidence in support of its second affirmative defense. (Record, p. 206.)

XIII.

The Court erred in sustaining the demurrer of the plaintiff to the first affirmative defense set forth in defendant's original answer. (Record, p. 206.)

XIV.

The Court erred in refusing to permit defendant to introduce evidence in support of its first affirmative defense, set forth in its amended answer. (Record, p. 206.)

XV.

The Court erred in denying defendant's motion for a new trial. (Record, p. 206.)

The grounds upon which the motion for a new trial was based were:

First: Errors in law occurring at the trial of said cause, and then and there excepted to by the defendant, which error consisted in granting the motion of the plaintiff for a directed verdict against the defendant at the conclusion of the introduction of the testimony and in refusing to vacate and set aside the verdict of the jury rendered in favor of the plaintiff and against the defendant for the sum of \$15,129.81, with interest at the rate of 6 per cent per annum from the 5th of March, 1910. (Record, p. 171.)

Second: Newly discovered evidence, material to the defendant and which the defendant could not with reasonable diligence have discovered and produced at the trial. (Record, p. 171.)

The motion for a new trial was based upon the affidavits of E. S. McCord (Record, pp. 172, 176, 178, 180); J. A. Swalwell, (Record, p. 177); Richard D. Lang (Record, p. 187); and Abner H. Ferguson (Record, p. 189.)

ARGUMENT.

The various questions presented by this record can, we think, be best grouped and discussed under

the sub-divisions and propositions hereinafter stated.

I.

The motion for a directed verdict should not have been granted by the Court.

The second affirmative defense in the amended answer alleges as follows:

“That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy, as Examiner of Surveys was authorized to make and pay on behalf of the United States.”

There was ample evidence, uncontradicted, to support this defense. This Court will bear in mind that the case of the Government rested solely upon the testimony of M. P. McCoy, the unfaithful agent of the United States. He testified that it was his duty to run about ten per cent of all the lines shown in the Government surveys; that he did not perform this duty in accordance with his instructions in all cases, but that he did perform a considerable amount of work that was within the line of the performance of his work, and did expend considerable sums of money in performing this work, and that the money

he expended was a part of the money that was deposited to his credit in the defendant bank and which he was authorized to use for such purpose, and that he did use a portion of this money for such legitimate purpose, and while his testimony is somewhat unsatisfactory, still it is perfectly apparent that he did legitimately expend from \$1,000 to \$4,000 for the benefit of the Government. (Record, pp. 56, 57, 59, 63, 78, 79, 80, 81.)

On page 81 of the record he testified as follows:

“Q. You think four thousand is the maximum?”

A. Yes, sir.

Q. Would you consider that approximately the sum?

A. I should say a couple of thousand. It might have been more, it might have been less.

Q. It might have been as much as four thousand?

A. It might have been over two thousand.”

Whether it was one thousand, two thousand, or four thousand is immaterial so far as the action of the Court in taking the case from the jury is concerned. From an examination of the testimony there can be no question but that from \$2,000 to \$4,000 was expended by McCoy in paying for labor

and material used in running the lines of the Government surveys. He had the right to incur indebtedness for subsistence and labor in connection with these surveys. He had the right to expend the moneys of the Government for that purpose, and he was authorized to use the money deposited by the Government in the defendant bank for that purpose. He did, according to the uncontradicted testimony, expend such money for such legitimate purposes, and it was manifestly the duty of the Court to submit the case to the jury to determine to what extent, by reason of such proper expenditure the Government has failed to make out its case for the full amount sued for. The defendant was entitled to have credited upon the claim against it the amount of the fund that did go into lawful channels in accordance with the instructions of the Government and in the performance of the duties imposed upon McCoy by the Government. It makes no difference whether the amount was \$1,000, \$2,000, \$4,000, or any other sum. Clearly under the pleadings the Government could not rightfully recover a judgment against the defendant bank for the misappropriation of these funds, when the evidence, without contradiction, shows that a part of it

went where the Government intended it should go. It was for the jury to determine what the amount of the credit should be. Upon what principle of law or morals should the Government be permitted to recover for a loss, which, under the evidence in this case, it is plain it did not sustain? Were this case pending in the courts of the State of Washington the Supreme Court, on appeal, would have the power, and it might be its duty to reduce the judgment by the proper amount of credit to which the defendant was entitled. But if we understand the rule in this Court, and in the Federal Courts generally, this Court cannot in this action modify the judgment, but must reverse the action and send it back for a new trial. If the defendant were entitled to any credit of any sum the result must be the same,—the judgment of the lower court must be reversed.

This Court has uniformly held that if there is any evidence sufficient to go to the jury in support of the allegations of the complaint, or of an affirmative defense, it is the duty of the Court to submit the question to the jury, and we think there can be no doubt that a careful examination of McCoy's testimony will convince this Court that it would be most

unjust and unconscionable to permit the United States to recover a judgment in this case against the defendant for a sum manifestly from two to four thousand dollars in excess of any possible loss that it has sustained.

FICTITIOUS PAYEES.

Notwithstanding the language of the decision of this Court in the case of *United States vs. The National Bank of Commerce*, 205 Federal, 433, we again desire to present our contention that the checks in question were in legal effect negotiable instruments, payable to bearer, and that no liability resulted to the defendant bank in paying the checks as they did, even though the money was in the end misappropriated by McCoy to his own use.

This Court will bear in mind that M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, was the party in whose name the deposit was made upon the books of The National Bank of Commerce; that his signature was furnished to the bank by direction of the Secretary of the Treasury. The bank was notified that McCoy was the only person authorized to draw checks upon that account. He was clothed by the Government with authority to issue

checks upon this fund. The Government permitted him, as its agent, to issue negotiable paper and to place the same in circulation; McCoy affixed his genuine signature to each of the checks in controversy; he made the checks payable to fictitious payees, and endorsed the checks in the names of the payees and through the agency of other banks succeeded in getting the money into his possession.

“A check is a bill of exchange drawn on a bank, payable on demand. Except as otherwise herein provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.”

2d Rem. & Bal. Code, Sec. 3575.

“A bill of exchange is payable to bearer: ‘When it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.’ ”

2d Rem. & Bal. Code, Sec. 3400, Sub-div. 3.

“Where the drawer of a check intended to use the name of payee and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one within the negotiable instruments act of May 16, 1901, making a check payable to bearer, if payable to the order of a fictitious or non-existing person, and such fact is known to the person making it so payable.”

Snyder vs. Corn Exch. Nat'l Bank, 70 Atl., 876.

“As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person the holder may declare and recover upon it as a bill payable to bearer.”

Snyder vs. Corn Exch. Bank, supra.

In the case of *Phillips vs. Mercantile National Bank of New York* (140 N. Y., 556; 35 N. E., 982; 23 L. R. A., 584), the Cashier of the National Bank of Sumpter, S. C., had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, where it had an account. He drew checks upon that bank making them payable to the order of existing persons, but without their knowledge, and then endorsed the checks in their names to a firm of stockholders in New York, who collected them from the Mercantile Bank. The Receiver of the Sumpter Bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the endorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were

those of existing persons, and were therefore to be regarded as having been made payable to bearer and intended for delivery to stockholders in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent—so far as the New York Bank was concerned—was said to have been the intent of his bank and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the Court in that case said:

“Whether endorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee’s name, but that act did not affect the title or rights of the defendant.”

In this case it cannot be successfully maintained that McCoy did not know at the time he drew the checks that they were made payable to fictitious persons. It is true that he intended to perpetrate a fraud, but the statute does not say that the drawer of the check shall have knowledge of the fictitious or non-existing payee, but the fact must be known to the person making the check so payable. The statute does not limit the case to drawers of checks or makers of negotiable paper, but goes

farther and applies not only to the maker but to the person who has the power to draw the instrument and to put it into circulation.

We note that Court says in the opinion upon the former hearing of this case, at page 438:

“But we are inclined to the view that the United States is the drawer of the checks, and that the knowledge of McCoy is not to be imputed to the Government. He was the Government’s agent, it is true, but he was not the Government’s agent to draw checks to fictitious payees. In drawing such checks he was not only acting without authority, but in violation of his instructions, and in fraud of his principal.”

Had the account in The National Bank of Commerce been placed there to the credit of the United States and McCoy was authorized to draw checks upon that account, then we think the Court’s comment might not be inappropriate. But such is not the case. The money was placed in the bank to the credit of McCoy. True he was called the agent, but the legal title to the account was vested by the Government in McCoy. He was the only person authorized in his dealings with the bank to check upon the account. He had the legal title to the money just as much as though the money itself was in his possession. Had the Government placed the money in his hands and he had paid it out contrary to his in-

structions, the person who received the money certainly would have been protected, for the reason that by placing the money and the legal title to it in McCoy's hands the Government clothed him with the authority to dispose of it.

We do not think that any of the cases cited by counsel in the former hearing, or referred to by the Court in its opinion bear out the statement of the Court. The facts in all the cases were entirely different. In none of the cases as we read them were the facts similar to those in this case. Here, by the action of the Government, the legal title to the money was placed in McCoy's hands, and the uncontradicted testimony is that McCoy presented to the bank his letter of instructions, and that that letter of instructions authorized the bank to take McCoy's signature and to honor all checks drawn by him. (Record, pp. 67, 69, 70.)

In the case of *United States vs. National Exchange Bank*, 45 Fed., 163, a party feloniously and by false identifications succeeded in procuring a check from the postmaster of Milwaukee; the check was made payable to the party entitled to receive the money, but it was delivered to a party not entitled to it, the postmaster acting in good faith

in issuing the check and delivering it to such imposter. The bank paid the check and paid it to the identical person to whom the postmaster intended it to be paid. In that case the postmaster kept his account in the same way that McCoy kept his account with the National Bank of Commerce. He went with the imposter to the bank and identified him, and upon such identification the bank paid the check. Subsequently the government brought suit against the bank for the recovery of the money, and the Court held that the bank was not liable for the reason that the money was paid to the person to whom the postmaster intended it should be paid.

In this case the bank paid the money to the person that McCoy intended should receive it. McCoy put the paper into circulation and through his acts, representing the government, caused the money to be paid to the wrong person. The Court held that the bank was not in fault and that the government was not necessarily in fault and therefore allowed the loss to fall where chance placed it, viz: upon the government.

The case of *Hermon vs. Old Detroit National Bank* (116 N. W., 617; 17 L. R. A., N. S., 514) cited by counsel, distinguishes the case of the

United States vs. National Exchange Bank, 45 Fed., 163. In that case the Court says:

“In that case, the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was, of course, with the drawer and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee.”

And in the same case the Court says that the statute in question relating to fictitious payees applies only in cases where the drawer knowingly draws the check to the order of a fictitious payee. But in the *Harmon* case the Court recognized the distinction that we are endeavoring to present, *i. e.*, that McCoy and the postmaster occupy similar legal positions: both the agents of the government; both had the deposit placed in their names; and in the *Harmon* case the Court clearly recognized the authority of the postmaster, who was only a special agent of the government, to draw the check and identify the payee, or to make the check payable to bearer, and that by doing so he relieved the bank of any liability for paying it to the wrong person. McCoy, in drawing the checks, was acting in the line of his duties and had the right to draw checks

upon the deposit of the government to which he had the legal title, and there is no reason that occurs to us why a different rule should prevail in the case of the government from the rule that does prevail against private individuals. If the agent acts within the scope of his powers the government is necessarily bound by his acts. When the government enters into the business of dealing in negotiable paper it becomes bound by the laws regulating the issuance of negotiable paper to the same extent and in the same way that a private individual is bound. It is subject to the same rules and the same regulations that control private individuals. In its sovereign capacity it is free from suit without its consent and the statute of limitations and laches do not bind it; but when it becomes a party to a negotiable instrument it is bound exactly like other parties. The duty of giving notice of protest, of making demand, and various other duties imposed by the law merchant have been held to apply to the United States.

In the case of *Cooke vs. United States* (91 U. S., 395), the Court says:

“Laches is not imputable to the government in its character as sovereign by those subject to its dominion. Still a government may suffer loss

through the negligence of its officers. If it comes down from its position of sovereignty and enters the dominion of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange it must use the same diligence to charge the drawers and endorsers that is required of individuals, and if it fails in this its claim upon the parties is lost. Generally in respect to all the commercial business of the government, if an officer socially charged with the performance of any duty and authorized to represent the government in that behalf, neglects that duty and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its duties and must be charged with the consequences that follow such omissions in the commercial world."

Would it be seriously contended that if a private corporation had deposited money in the defendant bank to the credit of its agent, and authorized him to draw checks against the fund, that he would not have the authority to draw a check to a fictitious payee? As between himself and his principal he might not, but as between the bank and himself manifestly he would. The principal that clothes its agent with the authority to so use

his power as to perpetrate fraud must bear the loss if fraud be perpetrated, rather than the innocent party; and if McCoy, at the time he issued the checks intended to have the payees fictitious persons, then it seems to us that the checks were made payable to bearer and the bank was under no responsibility whatever in the premises.

The formalities with which the checks were issued were known to the Government and the checks were received by the Government at stated intervals during the time it was doing business with the defendant bank. No protest or objection was ever made as to the particular requirements of the checks. If the checks did not comply with the regulations the Government should have objected; not having objected it must follow that they were waived.

RECIPROCAL DUTIES BETWEEN BANK AND DEPOSITOR.

But whether this Court recognizes the authority of McCoy to draw bills of exchange or checks payable to fictitious payees or not, still the action of the lower court in granting the instructed verdict was clearly erroneous for other reasons. We

have insisted that the money was deposited to McCoy's credit and that the relation of debtor and creditor existed between McCoy as agent and the bank and that McCoy had authority to check on it without limitations or conditions, as he said in his testimony. But for the sake of argument assume that the money deposited to McCoy's credit at all times belonged to the Government. Then it must follow that the relation of debtor and creditor existed between the United States and the defendant bank. And, as was said in the case of *Cooke vs. United States, supra*, when the Government enters into commercial transactions it abandons its sovereignty and becomes bound by the ordinary usages and customs of commercial business and becomes bound by the rules regulating and controlling reciprocal obligations existing between a bank and its depositors. Among these obligations is the duty of the bank to furnish periodical statements of the condition of the account to the depositor. This is partly for the protection of the depositor and partly for the protection of the bank.

"It has long been the usage of banks to give out passbooks to their customers, in which the latter are credited with their proper deposits. These passbooks are sent in as occasion may seem to demand,

often periodically and by request of the bank as well as upon the volition of the depositors, and are posted or statements returned with them along with the paid checks or vouchers, showing the condition of the depositor's account upon the books of the bank. It matters little whether the passbooks are sent in voluntarily or by request of the bank to be posted—the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford means whereby the depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of dispute or litigation with the bank. They serve to protect him against the carelessness or fraud of the bank. The right thus accorded by banks to frequent accountings in this manner, so that the depositor may keep informed as to the condition of his account, as it appears upon the books of his depository, is one of such manifest advantage that it entails a correlative duty upon the depositor. It requires of him an examination of the account rendered, and, if errors or omissions become apparent, it is then incumbent upon him to bring them to the attention of the bank, by returning his passbook for correction, or by other convenient method. Otherwise his silence will

be regarded as an admission that the entries as shown are correct.”

National Bank of Commerce vs. Tacoma Mill Company, 182 Fed., 6.

“The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a passbook.”

Leather Manufacturers' Bank vs. Morgan, 117 U. S., 96.

In the *Tacoma Mill Company* case, *supra*, the entire subject of the correlative duties between bank and depositor is considered and the authorities reviewed, and the court says:

“It being the duty of the depositor to examine the statements of his bank when periodically balancing his passbook, it must follow that he is charged with knowledge of what those statements contain, whether he makes the examination in person or through an agent designated for the purpose. Logically, also he must know the state of his own accounts, if regularly and honestly kept. He is not bound to know what a dishonest clerk may have inserted therein, contrary to the fact and with a purpose of deceiving and defrauding him, but he would be bound to know what the legitimate facts or entries would disclose if followed to their natural sequence in the exercise of ordinary business care and alertness. That is to say, if legitim-

ate entries and the manner of their entry in books of account or books of business memorando would be suggestive of other facts, or would lead to further inquiry before an ordinarily prudent man, acting in business concerns, would be satisfied, then the principal must know what the inquiry would result in if the information at hand were followed to its natural conclusion."

The doctrine of the above mentioned case is in line with the principles of the leading decisions of the United States Supreme Court and other courts.

Now let us apply the foregoing principles of law to the facts in this case. McCoy was the agent of the government; he rendered to the government weekly, monthly and quarterly statements; sent to the government forged pay-rolls, forged vouchers and forged receipts for a period of more than two years. His duties were to examine in the field one-tenth of the actual surveys of various townships of the public domain and he was required to and did send in to the government reports, maps, drawings, and field notes of his work. The slightest examination or inquiry on the part of the Government would have immediately disclosed his fraudulent practices and would have prevented a continuation of them, and would have rendered it impossible for him to have succeeded in defrauding either the Government or the bank. He was con-

stantly in the city of Seattle and sent his reports to the Government as to his field work and of his expenditures in doing the work from Seattle; he sent in reports covering his field work in Washington, Montana and Idaho, giving the names and post office addresses of the fictitious persons whom he claimed to have employed. With the vast army of secret service men employed by the Government it would seem that it was the grossest carelessness on the part of the Government not to have discovered, for considerably more than two years, that McCoy's maps and field notes were made up without his ever having gone upon the ground himself. An inquiry addressed to any of the local employes of the Government in the land department, the treasury department, or the legal department, would have enabled the Government to discover that his whole course of conduct was saturated with fraud.

Moreover, the defendant bank paid the checks drawn by McCoy upon his bank account, made out in his handwriting and signed by his guaranteed signature; paid them, however, through other banks. His account with the bank was balanced each month and a statement of the same furnished to him, and a statement furnished to the Treasury Department.

Every three months all of the vouchers drawn by him were forwarded by the bank to the Government and were retained by the Government, as well as the statements, without question or protest. The Government was charged with the money that McCoy drew and acquiesced in his method of doing business. No protest was ever made by the Government either as to the form in which the checks were drawn or the fact that in many instances they failed to state the purpose for which they were drawn; and it was at all times within the power of the Government to have discovered, by the exercise of even ordinary diligence, his fraudulent practices.

Had the Government exercised this ordinary diligence promptly, then no damage would have resulted, except as to the earlier fraudulent acts. It was the duty of the Government to exercise at least ordinary diligence in investigating the acts of its agent, and such investigation would unquestionably have led to the discovery of the fraud.

The Government did not do this, and now seeks to compel the bank, that acted in good faith and with due diligence, to save it harmless against the loss brought about by its own negligence, and which could not have happened had it been diligent.

Judge Hanford in ruling upon the demurrer (Record, p. 17) clearly expressed the general rule of law and while he held that the statute did not apply did hold that the rule of law expressed in the statute had substantially the same force without the statute. The following is his language:

“There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obliged to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. There-

fore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender of his checks that the bank has paid, according to the rule of honesty and fair dealing the depositor becomes bound to look at the return and report any error promptly. The rule between individuals having mutual running accounts is that an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant, as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the Government to examine these returns and report errors in time, was a cause of the successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the Government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The Court sustains the demurrer to the first affirmative defense and overrules it as to the second."

In the latter part of Judge Hanford's decision he says that where both parties have been

negligent and a loss has occurred, the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. So it would seem that if both the Government and the bank were acting in good faith and that the loss has resulted by their mutual mistakes or mutual neglect, then the loss shall remain where it has fallen.

Counsel may be relying upon the case of *United States vs. National Exchange Bank*, 214 U. S., 302, but the facts in that case are entirely different from those in this case. In that case the United States sought to recover payments made at the United States Sub-Treasury at Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. Upon receipt of pension vouchers regular in form and purporting to be executed by the pensioner named therein but which in fact were forged, the United States Pension Agent at Boston drew checks upon the Sub-Treasury at Boston, aggregating \$6,362.07, in favor of the pensioners named in the vouchers and transmitted said checks by mail direct to the address of each pensioner, as given in the vouchers. The checks, with the purported

endorsements thereon of the payees, were cashed by the Exchange Bank and immediately endorsed to a National Bank at Boston for collection. The checks were presented by the collecting bank at the Sub-Treasury of the United States at Boston. The collecting bank received payment for the same and accounted for the payment to the Exchange Bank.

In this case the Court held the United States could recover and at the conclusion of the opinion the Court said:

“Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged endorsement having been broken at the time the checks were cashed by the United States and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the defendant.

“The conclusion to which we have thus come renders it unnecessary to consider whether, if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay.”

In this case the defendant paid these checks

with fictitious endorsements, charged the amount thereof to McCoy's account and promptly notified the Government of such charge. The Government received the accounts and vouchers and has presented them in this case. It was the duty of the Government to have made a demand upon the defendant for the money and it has assumed this burden by making and pleading the demand; but it did not do so until six months after the discovery of the forgeries. The evidence shows that during all the months between the discovery of the forgeries in September, 1909, and the demand upon the bank on March 5th, 1910, the Bank of Commerce had rendered monthly statements of its accounts to the various banks from whom it received the checks in question for collection. It might have recovered the money had the notice of the forgeries been promptly given. Its recourse against these forwarding banks from whom it received the checks is now doubtful and the defendant has sustained an injury, at least to the extent of rendering it extremely doubtful as to its right of recourse against the forwarding banks.

In the case of *Exchange Bank vs. United States*, 151 Fed., 407, it is said:

"None of the cases made any exception of the kind claimed by the United States in the case at bar, namely, that the defending bank, in order to meet the demand of the United States, is bound to establish that it suffered detriment by the delay.

* * * Some of the cases in discussing the matter differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

"Consequently, if this were a case of commercial paper proper as known in the law of merchants, and between individuals, it is established that unreasonable delay in giving notice after the discovery of the forgeries would have discharged the Exchange Bank, without regard, ordinarily, to any question whether it suffered damage thereby. This, of course, is an exceptional rule, applicable to distinctly commercial paper, because with regard to liability for money paid on a signature supposed to be genuine, but forged, or paid under any other mistake, in ordinary transactions it is admittedly necessary that damage should have ensued by reason of any alleged negligence in giving notice of the facts. In conclusion as to this topic, the rule as we understand it is in entire harmony with the

fundamental principles of that portion of the commercial law which relates to giving parties to commercial paper notices of defaults. They insist upon promptness, but ordinarily require no proof, pro or con, on the question whether damage resulted from delay."

When the Government received the periodical statements from the defendant bank and made no objection or protest against the correctness of the same for a period of more than two years, the presumption arose that the Government had acquiesced in these statements and the account as between the Government and the bank became a stated account and in order to evade the effect of this condition the Government by the testimony admits that by the exercise of the slightest investigation it could have discovered the forgeries and fraud and could have protected itself and the bank. It therefore admits its own negligence and yet seeks to have the stated account set aside and seeks to recover from the bank for a loss occasioned by its own negligence. It repudiates the acts of its own agent, ignores all of the equities in the case and the rights of the defendant bank and seeks to take advantage of its own wrong. It has continuously refused to surrender the vouchers so that the de-

fendant bank might proceed against the other banks to whom it paid the money on the checks; it has acted in utter disregard of the rights of the defendant and has thrown every obstacle in the way to prevent the bank from recouping its losses by proceeding against third parties. It admits that it could have discovered the frauds, but did not do so, and yet seeks to compel the bank, an innocent party, to pay the loss sustained by the Government and acquiesced in for a period of more than three years. It clothed McCoy with the power to draw the checks upon the defendant and with full knowledge of the drawing of such checks and their payment by the bank, the Government stood by and exerted its utmost efforts to prevent the bank from recovering the money from third parties and has rendered it impossible for the bank to successfully prosecute any action against third parties for the recovery of the sums in controversy, by withholding the checks. It has disregarded the universal rule requiring a party who receives forged instruments to immediately give notice of the forgeries upon their discovery, and to return the documents.

If ever a case existed where the rule of law requiring the loss to remain where it falls should be enforced, this is such a case. Even though for the sake of argument it might be conceded that the bank should not have paid out the money without a more strict identification of the payees and was, therefore, guilty of some negligence, still the laches, and delays, and refusal to return the documents on the part of the Government rendered the Government guilty of contributory negligence and the action of the lower Court in granting the non-suit was clearly justified by the record in the case and by the law.

INSTRUCTIONS REFUSED.

The first instruction requested by the defendant was as follows:

“The defendant in this case has alleged as an affirmative defense that the money sued for in this action, whether passing through the hands of fictitious payees or otherwise, was expended and used by M. P. McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States and in payment of claims that the said McCoy, as Special Examiner

of Surveys, was authorized to make and pay on behalf of the United States.

"If you find from the evidence in this case that the money sued upon in this action was withdrawn from the defendant bank and was expended by McCoy in payment of claims against the United States which McCoy as Special Examiner of Surveys was authorized to pay on behalf of the United States, then I instruct you that the plaintiff cannot recover in this action for the reason that the United States in such case would have suffered no damage.

"I further instruct you that if you find that any portion of the money sued for in this action was so expended by the said McCoy in payment of legitimate claims against the United States created by him and which he had a right to create, then I instruct you that the plaintiff cannot recover for such portion of the sum sued upon as was so expended by the said McCoy."

This instruction correctly states the law and the refusal of the Court to give this instruction and submit the case to the jury was clearly error. The issue was clearly made as to whether or not McCoy had misappropriated the funds in defendant's bank belonging to the Government. If the Government did not sustain the loss and the money was expended by McCoy for legitimate purposes in connection with the performance of his duties as Examiner of Surveys, then the Government, to

that extent at least, failed in its proof, and it was the duty of the Court to submit the question to the jury and it was for the jury, upon the ample evidence introduced, to determine to what extent the Government had failed to establish its right to recover the amount sued for.

The second instruction requested by the defendant was as follows:

“It is contended by the plaintiff that there is due the United States from the defendant bank the sum of \$15,129.81, for moneys fraudulently withdrawn from the defendant bank by M. P. McCoy. The defendant, among other things, contends that in any event it is entitled to credit upon the sum of \$5,718, being the amount that the said McCoy was charged, in an indictment by the United States against him, with embezzling, upon which indictment the said M. P. McCoy was convicted and sentenced to the penitentiary for a term of years.

“If you find from the evidence in this case that the said sum of \$5,718, referred to in said indictment and introduced in evidence in this case, constituted a portion of the \$15,129.81 sued for in this action, then I instruct you that the plaintiff cannot recover for the said sum of \$5,718, and such sum must be deducted from the total amount of \$15,129.81, for the reason that the judgment of conviction against the said M. P. McCoy upon said indictment conclusively established the fact that such sum of \$5,718 was the money and property of the United States, and by filing such indictment against the said McCoy for such sum and procur-

ing a conviction thereon, the United States elected to treat said sum mentioned in said indictment as its own property and thereby waived its claim for said sum against the defendant bank."

The third affirmative defense alleges that subsequent to the issuance of the checks described in the complaint and their payment by the defendant, the plaintiff, with full knowledge of the facts, ratified and approved the action of M. P. McCoy in drawing such checks in the way in which they were drawn and the action of the defendant in paying them and charging the amounts thereof to the accounts of the plaintiff, carried on the books of the defendant in the name of M. P. McCoy, as Examiner of Surveys and Special Disbursing Agent.

The relation of debtor and creditor existed between the bank and McCoy as such Examiner of Surveys and Special Disbursing Agent, or the relation of debtor and creditor existed between the bank and the Government. The title to the money so deposited by the Government became the money of the bank from the moment the deposit was made and the bank owed the money to the Government or McCoy.

On the first of September, 1909, after the dis-

covery of the defalcations of McCoy, the United States caused McCoy to be indicted by the Grand Jury. The indictment is found on page 119 of the record, and it is specifically charged therein that McCoy: "did, by virtue of his said office and employment and while so employed and acting as such disbursing officer of the United States, receive and take into his possession certain public moneys of the United States, to-wit, the sum of \$5,718 lawful money of the United States of America then and there the property of the United States * * * and the said McCoy did then and there wilfully, unlawfully and fraudulently embezzle and convert to his own use said public funds of the United States, to-wit \$5,718 lawful money of the United States."

Upon this indictment McCoy was convicted and sentenced to the penitentiary and served his term for embezzling the funds of the United States.

One of two things must be manifest. Either McCoy was wrongfully convicted and sentenced to the penitentiary or the allegation of the indictment is true, that the money McCoy embezzled was the money of the United States.

The Government, acting through the Department of Justice, and presumably under the direc-

tion of the Attorney General of the United States—the head of one of the great departments of the Government, charged in the indictment that the money McCoy embezzled was the money and property of the United States. The jury found such to be the fact, and the Court, by entering the judgment against McCoy in the criminal case found as a fact that the \$5,718 was on the first of September, 1909, or at the date of the indictment and trial, the property of the United States. The Government, therefore, in the most solemn way, elected to treat the money that McCoy had embezzled as the money of the Government and not the money of The National Bank of Commerce. Its action, in legal effect, amounted to a clear-cut unqualified ratification of the action of McCoy in withdrawing the funds upon his checks payable to fictitious payees. It is said that McCoy had withdrawn the money from the bank fraudulently, but that the money when so withdrawn from the bank became and remained the money and property of the United States. No more solemn and convincing proof of the election upon the part of the Department of Justice to treat the money as the money of the Government and not the money of the bank could

be produced. This action was equivalent to the Government saying: "We recognize and approve of McCoy's authority to get possession of this money in the fraudulent way he did get possession of it, and the Government will punish him for the embezzlement of the funds."

The moment McCoy drew the checks and got the money it became the duty of the Government to elect whether it would look to McCoy for the return of these funds or look to the bank. It could not do both. Even though the payment by the bank to McCoy through the medium of fictitious payees was in the first instance unauthorized, still this action on the part of the Government was a subsequent ratification of the authority of McCoy to so withdraw the funds in the manner and by the means utilized by him.

When the Government comes into the courts as a suitor it submits itself to the jurisdiction of the Court and is bound by the same rules of evidence and by the same principles of law as any other suitor. It did come into the Court, after the defalcations had occurred and after the Government had acquired full information and knowledge as to all of the facts concerning the same, and caused McCoy

to be indicted, prosecuted and convicted upon the theory and upon the solemn allegation that the Government had elected to ratify his act in withdrawing the funds from the bank, and alleging that after he had withdrawn the funds they became the money of the United States. Such being the case why should not the Government be bound by its election to treat the \$5,718 as the money of the Government and not the money of the bank, in the same way as though a private individual had made such election.

Suppose that The National Bank of Commerce, after the defalcation, had filed a complaint before the United States Commissioner charging McCoy with the embezzlement of \$5,718, then and there the property of the bank, and had sworn to the complaint, and afterward assisted in the prosecution of McCoy for embezzling the bank's funds. Would not the Government have contended in this action that such procedure on the part of the bank clearly amounted to an election by the bank to treat the money so embezzled or stolen by McCoy as the money of the bank and not the money of the Government? Surely the Government ought not to stand in any better position than that of any other

litigant; and it will not do to say that the courts and the United States District Attorney did not have authority to bind the Government by such action upon its part.

All of the proceedings in the District Courts instituted by the United States are under the supervision and direction of the Attorney General. The Attorney General is a member of the Cabinet and his department is certainly of equal rank with that of the Treasury Department. Suppose the Secretary of the Treasury, when he was in possession of all the facts relating to McCoy's misdoings had expressly ratified his action in withdrawing the funds from the bank in the manner in which he did withdraw them, would not the Government be bound? The position of the Secretary of the Treasury is no more exalted than that of the Attorney General of the United States.

Again, suppose that after McCoy had withdrawn this money from the bank he had paid the same over to the Government, and the Government, with full knowledge of the fact had received the same, thereby ratifying McCoy's action in checking the money out of the bank, could it be reasonably asserted or contended that the Government, not-

withstanding its receipt of the proceeds of the checks, could, nevertheless sue the bank, as it is doing in this action. The Court will remember that this indictment was not found until, as the evidence shows, the Government was fully and completely advised as to the exact facts surrounding the defalcations of McCoy. The instruction clearly stated the law and the case should have been submitted to the jury under the instruction requested. The defendant bank was clearly entitled to have the jury instructed that in no event was the plaintiff entitled to recover from the defendant the \$5,718, the withdrawal of which from the bank had been ratified and confirmed by the Government; and the defendant was entitled to a credit of that sum upon the amount claimed in the prayer of the complaint.

One of the issues in the case under the pleadings was the ratification on the part of the Government of the acts of McCoy in withdrawing these funds from the bank. The indictment itself, as well as the testimony of McCoy furnished the proof of the ratification. This proof was not attempted to be contradicted by any evidence on the part of the Government. On the contrary, at page 75 of the

record Mr. Fishburne stated that he would stipulate that McCoy was indicted, arrested and convicted of the embezzlement covered by the checks shown in Exhibit "A" and it was stipulated that the indictment should be introduced, showing the charge against him.

The indictment not only amounted to a ratification of McCoy's acts in withdrawing the money from the bank, but it amounted to a recognition by the Government that the title to the money passed from the bank to the Government and went into the possession of McCoy as the agent of the Government. Without such title and possession the crime of embezzlement could not have been consummated.

The ratification is so plain that it needs no argument nor citations to convince the Court that the case should not have been taken from the jury, but that the question of ratification should have been submitted to the jury for their determination. Therefore, it seems to us to be perfectly manifest that the lower Court was in error in directing an instructed verdict.

"The underlying principle of all the decisions is that when the sovereign comes into Court to assert a pecuniary demand against the citizen, the Court has authority and is under the duty to with-

hold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the Courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application."

Walker vs. United States, 139 Fed., 413.

Lindsey vs. Hawes, 2 Black, 560.

Davis vs. Gray, 16 Wall., 203.

U. S. vs. Bank of Metropolis, 15 Pet., 392.

Sinking Fund Cases, 99 U. S., 719.

U. S. vs. Barker, 12 Wheat, 559.

Cooke vs. U. S., 91 U. S., 398.

Duval vs. U. S., 25 Ct. Cl., 60.

Hartson vs. U. S., 21 Ct. Cl., 456.

“Whenever an affirmative act is necessary on behalf of the United States to effect or enforce a pecuniary right against an individual, the officer or department whose duty it is to do that act represents the United States as to that matter, and it is bound by his action or nonaction.”

U. S. vs. Barker, 12 Wheat., 559.

U. S. vs. Bank, 15 Pet., 377.

The officials of the Department of Justice were charged with the duty of determining the effect of the transactions surrounding the defalcations of McCoy. It was their duty to determine whether they would treat the money appropriated by McCoy as the property of the United States or of someone else. The determination of this fact and this question was within the scope and powers of those officials presumably acting under the direction of the Attorney general, and there is no reason why the United States cannot be bound by its election in the same way as a private individual would be bound who acted in a similar way under similar circumstances.

The sixth instruction requested by the defendant was as follows, and should have been given:

“If you find from the evidence in this case that at the time the account was opened in The National

Bank of Commerce by the United States in the name of M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, the plaintiff instructed the defendant bank to honor all checks drawn upon said account by the said M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, without limitation or condition, then I instruct you that defendant had the legal right to honor any checks so drawn by said McCoy regardless of the fact as to whether the payees were fictitious or otherwise, and if you find that such special instructions were given at the time of the opening of said account, then I instruct you that such special instructions would justify the defendant bank failing, if it did fail, to follow the general instructions issued by the Treasury Department of the United States."

The testimony of McCoy (Record pp. 63, 78, 79, 81) shows that at the time the deposit was made in the defendant bank by the Government to the credit of McCoy, the Secretary of the Treasury wrote a letter to McCoy, with directions to submit the letter to the bank; that McCoy did submit such letter to the bank, and that the letter instructed the bank to honor all checks drawn upon that account "when signed by M. P. McCoy, Examiner of Surveys and Special Disbursing Agent" without restriction or limitation. It is true that the general printed instructions of the Secretary of the Treasury might be evidence that would tend to contradict the testimony of McCoy as to the special letter of in-

structions given to him and submitted to the bank, with reference to his unlimited power to draw checks upon this account. There was, therefore, evidence as to his unlimited power to draw checks and there was evidence, as shown by the general instructions, tending to contradict this. There can be no question that the Secretary of the Treasury might promulgate certain regulations affecting United States depositors, but a letter written subsequent to these general instructions would amount to a modification of the general instructions. The letter would emanate from the same source as the instructions; the same authority that issued the instructions issued the letter. It was for the jury to weigh the evidence and for them, under proper instructions from the Court, to determine whether such a letter was written, and whether the special letter should prevail over the general instructions. This instruction undertook to so advise the jury as to their duties in determining the weight to be attached to this letter. Suppose it should be conceded that the letter in this particular instance did instruct the defendant bank to pay these checks when presented by McCoy without reference to the general instructions contained in the promulgated

circular. Then would it not have been the duty of the Court to have instructed the jury on the subject?

Now there was evidence to support the existence of such a letter and its contents. It was for the jury to determine whether it was ever written, and not for the Court. There was certainly ample evidence to support a finding if it had been made by the jury that such a special letter was written, authorizing the bank, unconditionally and without limitation, to honor any checks signed by McCoy. It was certainly erroneous for the Court to eliminate this question from the jury, and is an additional ground for asserting that the Court erred in directing a verdict.

The seventh instruction requested by the defendant should have been given, which instruction is as follows:

“If you find from the evidence in this case that the United States, by its properly authorized officers, ratified and approved the actions of the said M. P. McCoy in drawing the checks referred to in the complaint, and ratified the action of the defendant bank in paying such checks, if you find that it did pay them, and in charging the amounts of such checks to the account of the defendant, then I instruct you that such ratification and approval by the United States would estop the plaintiff from

a recovery in this action, and your verdict would be for the defendant."

The eighth instruction requested by the defendant should have been given, which instruction is as follows:

"If you find from the evidence in this case that the said M. P. McCoy was authorized to expend such portion of the money deposited to his account in the defendant bank for legitimate purposes in connection with the expense attendant upon the examination of surveys as he deemed expedient, then I instruct you that the burden rests upon the plaintiff in this case to establish by a preponderance of the evidence the fact that the money involved in this controversy was used by the said McCoy for purposes other than his legitimate expenses; and the burden also rests upon the Government to establish by a preponderance of the evidence what portion of the amount involved in this controversy was improperly expended by the said McCoy."

II.

A NEW TRIAL SHOULD HAVE BEEN GRANTED.

The first ground of the motion for a new trial was on account of error at law occurring at the trial, and excepted to by the defendant, which error consisted in granting the motion of the plaintiff for a directed verdict.

The reasons we have heretofore urged are ap-

plicable to the assignment as to the first ground of the motion for a new trial, and we do not consider it necessary to elaborate any further thereon.

The second ground of the motion for a new trial was as follows:

“Upon the ground of newly discovered evidence, material for the defendant and which the defendant could not with reasonable diligence have discovered and produced at the trial.”

The affidavit of E. S. McCord (Record pp. 173, 174, 175, 176, 178 and 179); of J. A. Swalwell (Record 177); of Richard D. Lang (Record 187-8); of Abner H. Ferguson (Record 189-192); as well as the affidavit of George P. Fishburne (Record 180-181) and the statement from the books of the Treasury Department at Washington (Record pp. 183-4) contain the evidence presented to the Court upon said motion for a new trial, and all of this evidence has been made a part of the bill of exceptions filed herein.

The evidence upon the motion for a new trial disclosed that M. P. McCoy, during the time he was in the service of the Government had executed to the United States a bond with the United States Fidelity & Guaranty Company as surety, conditioned for the faithful performance of his duties

as Examiner of Surveys and Special Disbursing Agent and for the accounting to the Government for all moneys coming into his hands as such agent, and that the bond did not provide the surety should be responsible for any salary paid to the said McCoy by the United States which said McCoy did not earn; that during a considerable portion of the time McCoy was employed by the Government he received a salary of \$270 per month; that the Government collected from the surety company the sum of \$3,000 upon the bond McCoy had given.

The Government after, or at the time of the collection of this \$3,000 from the surety company proceeded to reconstruct McCoy's account with the Government, and charged back to his account \$3,000 on account of salary, which it was claimed McCoy did not earn during the time he was perpetrating the frauds in question. After the account had been so reconstructed and McCoy had been charged with \$3,000 on account of salary claimed to have been improperly paid him, the Government credited upon his account the \$3,000 collected from the surety company.

The defendant at the time of the trial knew nothing of these facts in regard to the collection of

such money from the surety company, and did not know that the Government had ever received anything from McCoy or his bondsman, and only discovered the same after the trial of the case, and immediately began to investigate the facts with regard to the same, and ascertained them to be as above stated, and as shown in the record above referred to.

The defendant proceeded with due diligence and was guilty of no laches. It could not assume that the Government of the United States would undertake to collect from the defendant bank a sum greater by \$3,000, or any other sum, than the amount of the loss that it had sustained through the defalcations of McCoy. The surety company voluntarily paid this sum as McCoy's bondsman. The Government has received \$3,000 and instead of applying it upon the \$15,129.81 it applied it on a fictitious claim made by it against McCoy, contrary to the provisions of the bond.

This \$3,000 was collected by the Government before the suit was instituted and before a demand was made upon the bank for the amount prayed for in the claim; so at the time this suit was instituted the Government's legitimate and honest claim

against the bank could not possibly have exceeded \$12,129.81. The fact that this payment by the surety company of \$3,000 we think the record clearly shows was concealed from the defendant by the Government officials. Nowhere in the record or in the evidence is any reference made to the payment of this sum by the surety company. It is unconscionable and unjust to permit a plaintiff to recover \$3,000 more than its just, legitimate claim. The Government says in this case that it lost \$15,129.81 through the defalcations of McCoy. As a matter of fact it must be apparent to any fair minded man that the Government upon its own showing has not sustained such a loss by the sum of \$3,000. Fair dealing and good conscience ought to have induced the Government to give to the defendant bank credit for this sum. It did not do so. The defendant knew nothing of it until too late to produce the same at the trial; but it did so with commendable industry and celerity after the discovery of the fact, and the Court should have granted a new trial upon this ground, if for no other.

We cannot believe that this Court will sanction any such practice upon the part of the Government. There is no possible dispute as to the facts; they

stand admitted by the affidavits and the evidence in support of the motion for a new trial. Will this or any other court allow such an unprecedented outrage to be perpetrated upon the rights of the defendant bank?

We think this evidence is clearly admissible under the issues as made up, but this is immaterial. Whether admissible under the present issues or otherwise, the pleadings can be reconstructed so as to make it admissible. It is a just defense to the claim of the plaintiff and the defendant ought not to be held guilty of any laches in failing to produce that evidence which it had no reason to know existed.

We earnestly contend that the Court erred in refusing to grant the motion for a new trial upon this ground.

Defendant's Exhibit No. 1, which has been sent up as one of the original exhibits in this case contains a transcript of the various statements furnished by the defendant at monthly intervals during the period of time the checks described in the complaint were issued by McCoy and paid by the defendant bank, and further show the condition of the account of McCoy, and the witness

Walker offered to testify as to the course of dealings between the bank and the plaintiff relating to the transactions involved in the issuance and payment of the checks, showing that the bank rendered monthly statements to the Government during the entire period of three years when these defalcations occurred, and that they were all approved by the Government and no complaint or protest made by the Government, all of which tended to show a ratification on the part of the Government of the acts of McCoy in drawing the checks and in the act of the bank in paying such checks. It was for the jury to determine whether or not these acts amounted to a ratification of the action of McCoy in drawing the checks and the action of the bank in paying them. It was not for the Court to say that such acts were insufficient to amount to a ratification. Moreover, the exhibits introduced by the Government show affirmatively that all of the accounts of McCoy and the receipts for the payment of this money to various and sundry parties were ratified by the Commissioner of the Land Office.

All of these circumstances were evidence for the jury to consider in reaching a determination as

to whether or not there was a ratification of McCoy's acts.

For the foregoing reasons we confidently insist that the lower Court committed errors which necessitate the reversal of the judgment entered herein, and the granting of a new trial.

Respectfully submitted,

J. A. KERR,

EVAN S. McCORD,

Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court
of Appeals
FOR THE
NINTH CIRCUIT

THE NATIONAL BANK OF
COMMERCE, a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2458

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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STATEMENT OF FACTS.

During the years 1907, 1908 and 1909, M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the United States with headquarters at Seattle (see Trans. p. 37). McCoy's

official duties required him to go into the field in various parts of Washington, Oregon, Idaho and Montana and run over again one-tenth of the lines run by surveyors who made surveys of public land under contract with the government in order to check up their work (see Trans. p. 57). To pay for his expense in so doing, money to his credit as Special Disbursing Agent was deposited from time to time with the defendant, a national depository. McCoy was authorized to use the money only for the purpose of paying such expenses (see Trans. pp. 41 and 42). When he made a payment he was required to take the signature of the person he paid on a voucher and give him a check on said account in the defendant bank for that amount (Trans. bottom of p. 41 and top of p. 42). Each week, as required by the Government, he sent a report to the Government covering his work (Trans. bottom p. 44 and top p. 45) and each quarter he submitted an expense account to which was attached these vouchers (Trans. top p. 45 to top p. 46). Also each quarter the defendant bank sent to Washington the cancelled checks which were covered by McCoy's account (Trans. p. 70 near the bottom to p. 71). McCoy, instead of doing the work on the

surveys in 1907, 1908 and part of 1909, falsified his reports to the Government and made fraudulent checks purporting to pay for work which was never performed (Trans. 58-59). He forged vouchers for the amounts of the checks in the names of fictitious persons (Trans. bottom p. 72 and p. 73), made the checks payable to the same names, forged the names of the fictitious payees to the endorsements of the checks, and deposited the checks in other banks to the credit of fictitious payees. He assumed two fictitious names. Under the name J. G. King, he opened an account with the Columbia Valley Bank of Wenatchee and the Montana National Bank of Montana by correspondence, sending the checks to those banks by mail. With the Seattle National Bank he opened an account under the name of F. M. Clark, and he went personally to the bank for that purpose (Trans. pp. 64-66). None of the banks required that the payee named in the checks be identified. Those banks forwarded the forged checks to the defendant, and the defendant paid them. McCoy obtained money out of these other banks by forging checks in the fictitious names of the depositors therein (Trans. pp. 64-66, 68 near

bottom to 69) and deposited the money in his own personal account and used it (Trans. p. 80).

One W. G. Good, as special agent of the Government, was finally sent out to investigate McCoy's work about September, 1909, and found that the services McCoy claimed to have rendered had never been performed; that the vouchers covering these checks in question were false and the person's name therein fictitious (Trans. pp. 102 near bottom to 107 bottom). At the time Good made his investigation, the fraudulent checks for the months of July and August, 1909, were still in the defendant bank and had not yet been sent to Washington (Trans. pp. 104 and 118). McCoy confessed, was indicted and plead guilty. Good, during the investigation, obtained from the bank the checks for the two months of July and August, 1909, notified the bank that they were all fraudulent, as he says, "gave them the history of the whole case," and returned the checks to the possession of the bank (Trans. 113 near bottom to 115).

On March 4, 1910, the United States Attorney for the Western District of Washington made a demand for the repayment of the \$15,129.81 herein

sued upon, attached to his demand a list of the checks with their description and notified the defendant that its officers and attorneys would be allowed to inspect the checks. The bank later sent an officer to inspect the checks and he did so (Trans. pp. 116 and 117). The bank refused to repay the money and this action was instituted.

The defendant's answer, after denying and admitting certain allegations of the complaint, interposed three defenses as follows:

“1. That the deposits so made by the plaintiff with the defendant in favor of M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor, and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Examiner of Surveys and Special Disbursing

Agent, and that monthly statements were rendered to plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of said McCoy and upon the rendition of statements of his account to have examined said account and to have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had been promptly made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy the defendant is precluded from asserting any claim that it may have had against the various

banks which forwarded the checks in question to the defendant for payment, and that by reason of the plaintiff's failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

2. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy as Examiner of Surveys was authorized to make and pay on behalf of the United States.

3. That subsequent to the issuance of the checks described in the complaint and their payment by the defendant, the plaintiff, with full knowledge of the facts, ratified and approved the action of M. P. McCoy in drawing such checks in the way in which they were drawn, and the action of the defendant in paying them and charging the amounts thereof to the account of the plaintiff, carried on the books of the defendant in the name of M. P. McCoy as Examiner of Surveys and Special Disbursing Agent."

DEFENDANT'S SECOND AFFIRMATIVE DEFENSE.

In the second affirmative defense the defendant alleges that the money was expended by McCoy in payment of claims against the United States created by him under authority of the United States and which he was authorized to make and pay on behalf of the United States.

To sustain this defense the defendant must prove that a certain amount of the proceeds of these fraudulent checks was used to pay legitimate expenses of the Government. The evidence shows that the witness could not fix any amount. Thus in the transcript on pages 59 and 60 the testimony is as follows:

“Q. You did no work?

A. I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.

Q. How much did you pay out in that way?

A. I am unable to state.

Q. About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?

A. I don't think I could even approximate it.

* * * * *

Q. You think that you have spent about a couple of thousand, or it may be more?

A. It may be more or it may be less."

If the witness cannot fix the amount, certainly a court or jury cannot do so. That is certain which can be made certain, but the only way whereby this amount could be made certain would be for the jury to be sleight-of-hand artists and so be able to pull from the mouth of the witness facts that were never there. He entirely fails to show that any legitimate claims were paid from the proceeds of these fraudulent checks. Thus see transcript, pp. 80 and 81, where the following language is used:

"A. I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and overtime and part of the money I got from the fraudulent checks.

Q. You kept all of this money in the bank?

A. Yes, sir.

Q. The National Bank of Commerce?

A. Yes, sir.

Q. When you got money from these fraudulent checks and legitimate money, you put them all together in one account?

A. Yes, sir.

Q. Whether it was from one source or the other, part was from fraudulent sources and part from other sources?

A. Yes, sir.

Q. You could not tell which?

A. No, sir.

* * * * *

Q. So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A. Well, the amount was so small that I was paying out, compared with what I was getting in, that I would not have any means of knowing where it did come from.

Q. It was all mixed together?

A. Yes, sir."

The defendant cites no law to sustain his contention—we need none to refute it.

FICTITIOUS PAYEES.

The defendant contends that the checks in question were in legal effect negotiable instruments, payable to bearer, and that no liability resulted to the defendant bank in paying the checks as they did, even though the money was in the end misappropriated by McCoy to his own use and base

their contention on the *Rem. & Bal. Code*, which provides as follows:

“A bill of exchange is payable to bearer: ‘When it is payable to the order of a fictitious or non-existing person and *such fact was known to the person making it so payable.*’”

2d Rem. & Bal. Code, Sec. 3400, Sub-div. 3.

The defendant maintains that the legal title to the money was in McCoy. They overlook the fact that a deposit in the name of any Government agent is the same as if it were in the name of the Government itself. The money was not McCoy's. It was given to him by the Government to expend for certain purposes known to the bank. If the bank had failed it would have been the loss, not of McCoy, but of the Government. So the money was in legal effect to the credit of the Government and the Government was the depositor. Nothing that McCoy could do with this money within the scope of his duties could redound to his personal benefit or result in a personal loss and so if the Government was the real owner and depositor of the money, on the same principle, the United States was the real maker of any checks drawn on this fund.

Although these checks were signed by McCoy "M. P. McCoy, Examiner of Surveys and Sp. D. A." the Government was the maker of these checks, under the familiar exception to the general rule of agency that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal, even where they are signed by the agent personally.

Jones vs. LeTombe, 3 Dallas 383, 1 L. Ed. 647;

Armour vs. Roberts, 151 Fed. 846, 852;

Hodgson vs. Dexter, 1 Cranch 345, 2 L. Ed. 130;

Garland vs. Davis, 4 How. 131, 148; 11 L. Ed. 907;

29 Cyc. 1446-7.

Thus in *Hodgson vs. Dexter*, *Supra*, the defendant, then late Secretary of War, was sued for breach of a covenant on a certain lease in that the buildings on the premises had been destroyed by fire. In the body of the lease the covenantor was described as "Samuel Dexter, of the same place, Secretary of War," the covenant purported to run from "the said Samuel Dexter, for himself, his

heirs, executors, administrators and assigns," and the indenture was signed "Samuel Dexter, Seal." Of this indenture the Chief Justice says at pages 363-365 (L. Ed. 136-137) :

"It appears, from the pleadings, that Congress had passed a law authorizing and requiring the President to cause the public offices to be moved from Philadelphia to Washington; in pursuance of which law, instructions, by the President, were given, and the offices belonging to the Department of War were removed; that it became necessary to provide a war office, and that for this purpose and no other, the agreement was entered into by the defendant, who was then at the head of this department. During the lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government, are public and not personal.

They enure to the benefit of, and are obligatory on, the government; not the officer.

A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account."

In the *Hodgson* case just quoted it will be noted that the agent signed the contract personally and not officially and that, too, under seal.

Now under the statute, knowledge that the payees were fictitious must be brought home to the Government, the maker of the checks, and for McCoy's knowledge of this fact to be the Government's knowledge, he must have acquired such knowledge while acting within the scope of his duties as Special Disbursing Agent of the Government. And he was not acting within the scope of his duties for two reasons: first, that McCoy obtained his knowledge that these payees were fictitious while he was engaged in a scheme to defraud the Government and, second, that the regulations of the Treasury Department which had the force of law and of which the court takes judicial notice, prohibit the execution of commercial paper of a disbursing agent in the name of a fictitious payee.

The law sustaining the first reason is well stated by Pomeroy in his *Equity Jurisprudence*, where he says in Vol. 2, Section 675:

“It is now settled by a series of decisions possessing the highest authority, that when an

agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed."

In *National Bank of Commerce vs. Tacoma Mill Co.* (1910), 182 Fed. 1, 11, the court says that the principal "cannot be held liable for the deceitful and dishonest acts of his agent, for the simple and very potent reason that the agent is not his agent for such purposes. As to them, the agent is acting wholly without the scope of his authority."

It is a general rule of the law of agency that a principal is bound by the knowledge of his agent for the reason that the law presumes the agent has discharged his duty of communicating his knowledge to his principal. An exception to the rule is when the agent is engaged in committing an independent fraudulent act for his own benefit and is based on the grounds that where one in transacting the business of his principal is committing

a fraud for his own benefit, he is not acting within the scope of his duties as his principal's agent, and, also, that it cannot be fairly presumed that an agent will communicate to his principal a fraud intended for his own and not his principal's benefit when the disclosure itself would expose and defeat his fraudulent purpose.

As to the reason that where one in transacting the business of his principal, is committing a fraud for his own benefit, he is not acting within the scope of his duties as his principal's agent, a most cogent and convincing authority will be found in the case of *United States vs. National Bank of Commerce* (C. C. A., Ninth Circuit, 1913), 205 Fed. 433, at page 438, where it is said:

“He was the Government's agent, it is true, but he was not its agent to draw checks to fictitious payees. In drawing such checks, he was not only acting without authority, but in violation of his instructions, and in fraud of his principal. That the knowledge of the agent is not in such a case the knowledge of the principal is held in the following cases: *Harmon vs. Old Detroit National Bank*, 153 Mich. 73, 116 N. W. 617; *Shipman vs. Bank*, 126 N. Y. 318; *Armstrong vs. National Bank*, 46 Ohio St. 512; *Chism vs. First National Bank*, 96 Tenn. 649.”

As to the second reason, that the regulations of the Treasury Department which had the force of law and of which the court takes judicial notice, prohibit the execution of commercial paper of a disbursing agent in the name of a fictitious payee, the best authority will be found in the case of *United States vs. National Bank of Commerce, Supra*, at page 438, where the following language is used:

“The defendant bank, as a national depository, was chargeable with notice of the limitations of McCoy’s authority to check out the public money deposited with it. Section 5153 of the Revised Statutes (U. S. Comp. St. 1901, p. 3465), provides:

‘All national banking associations, designated for that purpose by the Secretary of the Treasury, *shall be depositaries of public money*
* * * *under such regulations as may be prescribed by the Secretary.*’

One of the regulations promulgated by the Secretary of the Treasury on April 16, 1903 (Department Circular No. 49, Sec. 6), provides:

‘If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by departmental regulations, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.’

Department Circular No. 102, issued on December 7, 1906, contained the following:

‘Any check drawn by a disbursing officer upon moneys thus deposited, must be in favor of the party, by name, to whom the payment is to be made, and payable to ‘order,’ with these exceptions.’

The exceptions are not material to the present case. In *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169, it was said:

‘Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.’ ”

For additional authority to sustain this last reason, although we deem it unnecessary, see the following cases:

Marsh vs. Fulton County, 10 Wall. 676, 683;

The Mayor vs. Ray, 19 Wall. 468, 478;

Merchant’s Bank vs. Bergen County, 115 U. S. 384, 390-391;

Pine River Logging Co. vs. U. S., 186 U. S. 279, 291.

And so, under the doctrine laid down in *The Floyd Acceptances*, *Supra*, and this case on the former appeal, not only this defendant bank, but

every person dealing with McCoy's paper was required to ascertain at his peril, the agent's authority to execute the same. They were required to know as a matter of law that if the name of the payee on McCoy's check was not the name of the *real person* who rendered the service, or delivered the article for the use of the Government, it must be the name of McCoy.

We believe that it admits of no question that McCoy lacked authority to issue a check payable to a fictitious payee. The provisions of Department Circular No. 102, issued on December 7, 1906, are to the effect that *any* check drawn by a disbursing agent *must* be in favor of the party, *by name*, to whom the payment is to be made and payable to "order" because of the requirements by banks in such cases that the payee be identified and the authenticity of his signature established. Such precautions are no more and no less than the contract which the defendant bank and every other bank dealing with this paper engaged to perform. It is the violation of that duty which is the proximate cause of the loss in this case and the defendant is liable.

The case of *United States vs. National Exchange Bank*, 45 Fed. 163, is clearly distinguishable from this case. There the Postmaster did not attempt to commit a fraud as McCoy did here, but was defrauded. There the check was made payable to the party entitled to receive the money and delivered to a party not entitled to it. The Postmaster acted in good faith both in the issuance and delivery of the check. He did not act in bad faith as in this case. In that case the Postmaster identified the payee as is required, in this case the payees were not identified. If the bank had required identification of the payees the loss would not have been sustained. In that case the Government agent was acting within the scope of his employment and in good faith and was defrauded, here, the agent was acting outside the scope of his employment and is attempting to defraud.

DUTIES OF BANK AND DEPOSITOR.

A. EXAMINATION OF PASS BOOK BY DEPOSITOR.

An examination by the depositor of his pass book and checks is all the law requires, and where such examination, as in this case, would have disclosed no irregularities to the Government, the

record need not show whether such examination was or was not made.

Thus in *Leather Manufacturers' Bank vs. Morgan*, 117 U. S. 96, 117, 29 L. Ed. 811, 819, the court says:

“From *Welsh vs. German-American Bank*, it is clear that the comparison by the depositor of his check book with his pass book would not necessarily have disclosed the fraud of his clerk; for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk or some one else had forged the payee's name in the indorsement.”

B. INDEPENDENT INVESTIGATION OF DEPOSITOR.

Counsel attempted to put into this record facts indicating that the Government by some independent investigation could have determined whether or not McCoy was conducting his business for the Government in a regular manner, but such facts, even if established, cannot avail the defendant, for

the depositor owes the bank no duty even to search for or discover forged endorsements on his bills or checks (*National City Bank vs. Third National Bank*, 177 Fed. 136, 140) nor to conduct an independent investigation in order to prevent the fraud of a dishonest agent (*National Bank of Commerce vs. Tacoma Mill Company*, 182 Fed. 1, 12-13).

The Government was not negligent in failing to discover these forgeries for the additional reason that the Government is not presumed, any more than any other depositor, to know the signatures of the payees of its checks.

United States vs. National Exchange Bank,
214 U. S. 302, 317, 53 L. Ed. 1006, 1012.

Leather Manufacturers' Bank vs. Morgan,
117 U. S. 96, 117; 29 L. Ed. 811, 819.

C. BANK'S NEGLIGENCE CAUSED LOSS.

The opposing counsel maintain that had the Government exercised ordinary diligence no damage would have resulted.

It appears from the testimony in this case that McCoy deposited these checks in other banks where he gave a false name and that defendant bank paid them, relying on the endorsements of the other

banks. It does not appear that this defendant made any investigation whatever to determine the authenticity of the endorsements. It also appears that an examination of the cancelled checks and the bank's statement would not have revealed the irregularities of McCoy.

This contention of the plaintiff in error is best answered by the opinion of this court in *United States vs. National Bank of Commerce, Supra*, at page 436, where the court says:

“The defendant contends that it may be sustained on the ground of the plaintiff's negligence in not discovering the frauds of McCoy sooner than it did. But the defendant having been negligent, and the negligence of the banks through which it received the checks being imputable to it, it is in no position to urge the negligence of the Government as a defense to the action. In the absence of knowledge to the contrary, the Government had the right to rely upon the assumption that the defendant as the depositary of public money would do its duty, and there was nothing in the case to indicate that its reliance was misplaced until it discovered McCoy's frauds.

“Where a bank holds money of a depositor subject to check, it can be required to pay any valid check of the depositor, but it cannot charge against the depositor's account money paid upon a forged check, or upon a check to

which the bank has obtained title by way of a forgery.

“Of course, the Government was not chargeable with knowledge of the signatures of the payees of the checks of its disbursing agent. In *Leather Manf. Bank vs. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, Mr. Justice Harlan said:

“ ‘If the defendant’s officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account.’

* * * * *

“In *United States vs. National Exchange Bank*, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184, the court said:

“ ‘The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common

sense make clear could not be truthfully assumed.'

"And the court held that the United States was not chargeable with the knowledge of the signatures of the persons entitled to receive pensions. If that be true as to the signature of checks made to pension claimants, by the stronger reason it is true in regard to payments made to unknown persons whose signatures are not on file in any department of the Government, as was the case of the payments made by McCoy to persons who worked in his employment."

DEMAND.

It is said by the defendant that it was the duty of the Government to have made a demand upon the defendant for the money and it has assumed this burden by making and pleading the demand; but it did not do so until six months after the discovery of the forgeries. Also that the recourse of the defendant bank against the forwarding banks from whom it received the checks is now doubtful and the defendant has sustained an injury, at least to the extent of rendering it extremely doubtful as to its rights of recourse against the forwarding banks.

This contention is against the overwhelming weight of authority. Thus see *United States vs.*

National Bank of Commerce, Supra, at page 435, where the following language is used:

“We are unable to assent to the proposition that the possession of those checks by the defendant was necessary in order to enable it to maintain actions against the banks through which it received the same. The defendant made no demand for the checks, and made no offer to pay the money due the Government on condition that the checks be returned to it. Its refusal to pay was absolute and unconditional.

“Its cause of action against the banks through which it received the checks with the forged indorsements arose immediately upon its payment thereof. Said the court in *Leather Manf. Bank vs. Merchant's Bank*, 128 U. S. 26-35, 9 Sup. Ct. 3, 4 (32 L. Ed. 342):

“ ‘One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which in equity and good conscience has never ceased to be its property. * * * There is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run immediately upon the payment.’ ”

And see further the other cases cited by the court in its opinion as follows:

United States vs. National Exchange Bank,
214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed.
1006, 16 Ann. Cas. 1184;

United States vs. National Park Bank of N.
Y. (D. C.), 6 Fed. 852;

United States vs. Onondaga County Sav.
Bank (D. C.), 39 Fed. 259; and

Onondaga County Sav. Bank vs. United
States, 64 Fed. 703, 12 C. C. A. 407.

Again the court shows the unsoundness of the defendant's contention on page 437 of its opinion where it uses the following language:

"It is not shown that the defendant has suffered any prejudice, or has been in any way injured by the delay of the Government in commencing the action. When the demand was made upon it for repayment, the statute of limitations had not run against the defendant's right of action against the banks upon which it had the right of recourse, and the allegation in the amended answer that by reason of the failure of the Government to notify the bank of McCoy's fraud within a reasonable time it had lost its right against the various banks through which the checks had been forwarded for payment is not sustained."

In addition to the defendant's contention in

this regard being answered by the law as given in the court's opinion it is answered by the facts as appears in the transcript on pages 114 and 115, which reads as follows:

“(Testimony of W. G. Good.)

Q. And you returned them to the bank?

A. I returned them to the bank, and after—I think it was after Mr. McCoy plead guilty and I advised them of what took place in connection with Mr. McCoy and that those checks were fraudulent and that he admitted it, and so forth.

Q. And you told the banking officers, did you, that the checks were fraudulent?

A. Oh, yes.

Q. And in what way they were fraudulent?

A. Yes, sir; I gave them the history of the whole case and the transactions in connection with my investigation at that time.

Q. You left the checks in their possession?

A. Oh, yes; I returned them.”

Thus the bank knew the facts and its rights as soon as the Government.

This argument disposes of pages 42, 43 and 44 of the defendant's brief.

INSTRUCTIONS REFUSED.

FIRST—FIRST INSTRUCTION.

The argument on the first instruction (see pages 44 and 45 of defendant's brief) is answered by us in our argument on the second affirmative defense—see beginning of our brief.

SECOND—SECOND INSTRUCTION.

The part of the second instruction material to this argument is as follows:

“I instruct you that the plaintiff cannot recover for the said sum of \$5,718, and such sum must be deducted from the total amount of \$15,129.81, for the reason that the judgment of conviction against the said M. P. McCoy upon said indictment conclusively established the fact that such sum of \$5,718 was the money and property of the United States, and by filing such indictment against the said McCoy for such sum and procuring a conviction thereon, the United States elected to treat said sum mentioned in said indictment as its own property and thereby waived its claim for said sum against the defendant bank.”

The instruction and the defendant's argument on it overlook the point that the facts which prove the indictment would also prove our complaint and *vice versa*. The facts are not inconsistent, but con-

sistent. You can prove both the civil action and the indictment by them. Defendant has mistaken the doctrine of estoppel, which he is endeavoring to invoke.

Estoppel is defined in *Williams vs. Supreme Council A. L. of H.*, 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713, as follows:

“In the broad sense of the term ‘estoppel’ is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*.”

Again it is defined in *Bouvier Law Dict.* and quoted with approval in *Coogler vs. Rogers*, 25 Fla. 853, 873, 7 So. 391, as follows:

“The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part, or on the part of those under whom he claims.”

Again, *Greenleaf on Evidence* gives a definition which is approved in *South vs. Deaton*, 113 Ky. 312, 320, 68 S. W. 137, 1105, and is as follows:

“An estoppel arises: Where a man ‘has

done some act which the policy of the law will not permit him to gainsay or deny.' ”

“The purpose of all estoppels is to prevent duplicity and inconsistency.” *Bower vs. McCormack*, 23 Gratt. (Va.) 310.

Estoppel “concludes the truth in order to prevent fraud and falsehood.” *Van Rensselaer vs. Kearney*, 11 How. (U. S.) 297, 326, 13 L. Ed. 703.

It will be observed from these definitions that estoppel precludes the assertion of facts not law. *Moore vs. Willis*, 9 N. C. 555.

The defendant is urging that we are to be bound in a civil action by a position of law that we maintained in a criminal case. Even if his contention were borne out by the record it would not be sound. It is the duty of the United States to prosecute criminals such as McCoy. It is to the interest of the defendant that these prosecutions be made. It does not lie in the mouth of the defendant to say, “You maintained a certain position in prosecuting a criminal and that works as an estoppel against you to prevent your recovery in a civil action.”

The defendant says at page 50 of his brief, “The moment McCoy drew the checks and got the money it became the duty of the Government to

elect whether it would look to McCoy for the return of these funds or look to the bank. It could not do both." In this contention the defendant is wrong. Even if the Government had brought a civil action against McCoy it would not prevent a recovery from the bank. For the Government to recover from the bank it is necessary for McCoy to be in the wrong. But the Government merely prosecuted McCoy criminally as it was its duty to do. Does the defendant think for one instant that a court would sustain the proposition that either the State, United States or a private individual would lose any civil right because of their bringing a criminal to book? Does the defendant think that this would prevent duplicity and inconsistency or fraud and falsehood?

Sometimes money deposited in a bank is viewed as the property of the depositor and sometimes as a loan by the depositor to the bank. The fact is, the deposit of the money, whether it is a debt or property, is a conclusion of law from the fact. Thus in 5 *Cyc.* 517, it is said:

"A bank may maintain two relations with a depositor, his debtor with respect to one thing and his agent with respect to another. Again, it may be his agent at one time and his debtor

at another. When money is deposited in a bank it is said to be the debtor and the depositor the creditor. Yet in another sense the depositor is the owner and can at any time demand repayment."

Now in this case it is the fact that the money was deposited in the defendant bank and that McCoy misappropriated it as we set forth. It is consistent with our case to say that the money in the bank was the property of the United States and the bank our bailee, and that McCoy, our agent, through being our agent, wrongfully gets the money from the bank and misappropriates it. In such event both the bank and McCoy would be liable, the bank civilly, McCoy civilly and criminally. Or we can say that the bank is our debtor and McCoy wrongfully gets funds from the debtor. Under either theory both the bank and McCoy are wrong and can be sued.

But if we assume for the sake of argument that when the Government indicted McCoy it stated that the money taken by him was its own property. If that position were inconsistent with the one maintained in this case, it would not estop us. The facts that prove the indictment are the same that are

necessary to prove our complaint in this action, and the position we maintain in the indictment would be merely a different conclusion of law from the facts and it would certainly not estop us from going into a civil action and maintaining the other conclusion of law from the same facts, namely, that the bank and the depositor occupied the position of debtor and creditor. Pleadings such as indictments and complaints are part fact and part conclusions of law from facts. You can maintain different conclusions of law from the same set of facts in different civil cases, much less maintain an opposite position in a criminal case from one advocated in a civil case, provided only that it does not entail the falsification or change of your facts.

The purpose of estoppel is to prevent a man from coming into court on one day and swearing to certain facts and on the next, to maintain a different position, swearing to an opposite state of facts. If the doctrine of estoppel could be invoked at all in this case, the court would refuse to do so on the ground that it would be against public policy.

THIRD—SIXTH INSTRUCTION.

The germane portion of the sixth instruction of defendant is as follows:

“The plaintiff instructed the defendant bank to honor all checks drawn upon said account by the said M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, without limitation or condition, then I instruct you that defendant had the legal right to honor any checks so drawn by said McCoy regardless of the fact as to whether the payees were fictitious or otherwise, and if you find that such special instructions were given at the time of the opening of said account, then I instruct you that such special instructions would justify the defendant bank failing, if it did fail, to follow the general instructions issued by the Treasury Department of the United States.”

The defendant on this branch of the case overlooks Section 5153 U. S. R. S., which provides that:

“All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; * * *

And also the common law that the regulations of the Departments of Government made pursuant to law have the force of law and are judicially noticed by the court.

Caha vs. United States, 152 U. S. 211, 38 Ed. 415;

Cosmos Exploitation Co. vs. Gray Eagle Iron Co., 190 U. S. 301, 47 L. Ed. 1064.

If the facts could be twisted to mean what the defendant contends they do, he is checkmated by the law. If the Secretary of the Treasury had tried to give to McCoy instructions in a letter that were different from the Department Regulations, the court would have held that the instructions controlled and not the letter. The Secretary of the Treasury is limited in his authority just as McCoy was, and had no right to allow either McCoy or the bank to deal with Government money in any manner different from that prescribed by law. A letter written to McCoy, telling him that he was Disbursing Agent could not be construed by the most imaginative as being a Department Regulation. The word "regulation" has a well defined meaning that does not embrace such a letter as is here referred to. One of the reasons why "regulation" could not mean a letter is this, that the Department Regulations relate to all depositaries of public money and the Secretary of the Treasury has no right to discriminate in favor of a particular bank.

One of the Regulations (Department Circular No. 102, issued on December 7, 1906) provides that

"Any check drawn by a disbursing officer upon

moneys thus deposited, must be in favor of the party, by name, to whom the payment is to be made.”

That is, a disbursing agent has no authority to make checks payable to fictitious payees, the reason being that this would dispense with one of the safeguards against fraud—the identification of the payee. This rule is as much the law as Section 5153 and the Secretary of the Treasury has no more right to violate it than has the bank or McCoy. The power and authority of government officials is controlled entirely by public law and if the greatest or the humblest steps beyond his duty, he cannot bind the Government, and this the whole world knows because it is a matter of law.

Another answer. If we have not checkmated the defendant with the law, it seems to us that the facts have done so. The testimony shows that McCoy got a letter “that instructed me to sign checks as Special Disbursing Agent.” He did not think there were any limitations placed on his authority in this letter. He does not say what the contents of the letter were because he could not remember them. He does not say, and the testimony cannot be construed to be, that the letter gave him the

authority to sign these checks in any manner different from that prescribed by law and the Department Regulations for the drawing out of Government money by disbursing agents. All the testimony shows is that the letter appointed him a Special Disbursing Agent. It did not put any limitations on his authority or refer to any because it was already covered by the law and Department Regulations.

The contention of the defendant is as ridiculous as if a corporation had written to a bank and told it to honor all checks made by its agent to pay for boots and shoes and later on had written a letter to John Smith, telling him that he was its agent and to go to the bank and show his authority, there being no limitation in the letter on the authority of John Smith; and as if the bank had later honored checks of John Smith for timber contracts and then solemnly maintained that the letter to John Smith contained no limitations on his authority, and they were therefore justified in honoring his checks for all purposes.

The testimony on this subject will be found on pages 69, 70, 83 and 84, and is as follows:

(Testimony of M. P. McCoy.)

“Q. The bank had no other instructions, except from reading your letter?

A. I don't know, but I presume—

Q. I don't want any of your presumptions—you don't know?

A. I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q. No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you?

A. No, sir.

Q. There were no conditions, it had been remitted direct to the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A. Yes, sir, the purport of them.

Q. That is the substance?

A. I don't remember the wording exactly, but that is the substance or object of the letter.

Q. To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

A. Yes, sir.”

* * * * *

Q. And your written instructions were to show your orders to the bank, were they?

A. I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q. You were authorized to draw it out on your signature?

A. Yes, sir.

Q. You showed that to the bank?

A. Yes, sir.

Q. You didn't tell them anything about your being unlimited in your power to draw that money?

A. No, sir, I simply showed them my letter.

Q. The letter didn't contain any limitations on your powers?

A. No, sir.

Q. It was an unconditional authority?

A. Yes, sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q. With that exception there was no limitation?

A. No, sir.

Q. There was no limitation on the authority of the bank to pay you money?

Mr. FISHBURNE—Same objection, your Honor.

The COURT—Objection overruled.

Mr. FISHBURNE—Exception.

The COURT—Exception allowed.

A. No, sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q. It didn't say anything about it at all?

A. Well, I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q. You don't think that anything was stated as to any limitation at all?

A. I don't think that there was any limitation stated."

If we could override the law we should have material testimony to do so. Even in a State court such testimony as this would not be allowed to go to a jury. Besides this, where there is a conflict between statutory law and facts, the court must enforce the law, and it is not proper for a jury to determine which should control.

FOURTH—THE SEVENTH INSTRUCTION.

As to the seventh instruction, the reason it should not be given is covered by previous argument.

FIFTH—EIGHTH INSTRUCTION.

This instruction is also covered by previous argument.

NEW TRIAL.

A. RECORD SHOWS NEW TRIAL SHOULD
BE DENIED.

The contention of the defendant in his motion for a new trial is set forth in his brief on page 61 (near the bottom) and page 62.

The affidavit of the officer of the bonding company shows that the bond of McCoy was conditioned as follows:

“And conditioned upon the faithful performance of the duties of the said McCoy as Special Disbursing Agent and Examiner of Surveys for the United States in the States of Washington, Montana and Idaho, said bond being in the penalty of Three Thousand Dollars (\$3,000).”

The affidavit further states that after being notified of default on bond the affiant did, on the 5th day of January, 1910,

“pay to the said United States in full settlement of its liability under said bond aforementioned the sum of Three Thousand Dollars (\$3,000) for which it holds the receipt and release of the said United States of and from any liability against it on account of said bond.”

The record further shows on pages 183 and 184 that the Three Thousand Dollars paid by the bonding company was credited on the salary that was paid to McCoy himself and no part of it on these fraudulent checks. Even if we had a right in this

action to inquire into a contention between the bonding company and the United States, we are sure that the Government could so apply this money. The bond was conditioned upon the faithful performance of McCoy of his duties as Examiner of Surveys as well as Special Disbursing Agent. It was a violation of both duties to pay himself money for work that he never did, for surveys to make which he never even went on the ground.

Thus see the Record, at page 60, which reads as follows:

(Testimony of M. P. McCoy.)

“A. Only a part of them. I did a few of them.

Q. You were on all of them, were you not, with the exception of the one in northern Montana?

A. No, sir.

Q. How many all together?

A. I am unable to approximate. The records of the office will show, and I could not even approximate without having those records.”

Again, see on pages 61 and 62 of the record in the same testimony, which is as follows:

“A. Well, in quite a majority I did not examine in the field at all.

Q. Didn't do any field work at all?

A. No, sir.

Q. You had nobody do it?

A. No, sir.

* * * * *

Q. And during this time, a period of two years, you simply copied the notes from the Surveyor General's office?

A. They were not copied, they were faked, we made our—"

The record shows that McCoy was getting Two Hundred and Seventy-five Dollars (\$275) a month, so according to the record the Government lost more than the three thousand dollars on the breach of McCoy's duty as Examiner of Surveys and Special Disbursing Agent.

The record does not show that the bonding company, when it paid the money, stated on what portion of McCoy's defalcations the money should be applied and counsel will concede the rule that a debtor can apply money paid on an obligation to any portion of it that he desires—if an old account on the older items of the account, and so on. So here the Government had a right and did apply the three thousand dollars on the liability arising from

that breach of duty of McCoy's as to the payment of his own salary. Even if it had been improperly so credited that was *res inter alios acta*. The bonding company alone could complain and not this bank.

B. DOCTRINE OF SUBROGATION NOT APPLICABLE TO A WRONG DOER.

The doctrine of subrogation cannot be invoked in favor of a wrong doer. The fundamental principle underlying our recovery in this action, is that the Natinoal Bank of Commerce wrongfully paid out money on these forged checks.

Suppose that our surety company bond covered the total amount sued on by the Government, and that the United States had been paid by the bonding company for the total amount of McCoy's defalcations. It is just, and a court of law and equity would apply the rule, that the bonding company would be subrogated to the rights of the United States, and would have a right of recovery against the National Bank of Commerce for the total amount of the forged checks.

Now suppose, for the sake of argument, that the United States collected from the bonding company the total amount of its bond, and then sued the bank for the total amount of this indebtedness and recovered it from the bank, then the law is, that the surety company would have a right to sue the United States for the total amount collected from the bank. But the rule cannot be reversed. The bank cannot come in and tell the United States what it and the bonding company shall or shall not do. The bank is a wrong doer. It is not subrogated to the rights of the United States, and could not bring an action against the bonding company under this doctrine of subrogation.

We think these reasons are sufficient for the court to deny a new trial and make it unnecessary to give the subsequent ones, but as they exist, in order to exercise reasonable care, we will give the others.

C. THE MATTER SET OUT IN AFFIDAVIT NOT WITHIN ISSUES OF ORIGINAL TRIAL.

It is a well settled principle of law that in a motion for new trial, the attorney cannot set out

new matter that would be inadmissible unless the pleadings in the case were amended. The reason for the rule is that otherwise law suits would never be settled. This case is a fair example of the principle. We have a first trial, an appeal, and then a second trial, and after the second trial counsel endeavors to set up matter that could not be admitted under their answer without amending it.

D. LACK OF DILIGENCE.

Another reason why the motion would have to be overruled, is that there has been a lack of diligence on the part of Mr. McCord. The court will take judicial notice of the fact that it is known that all government disbursing agents have bonds, and an attorney should inquire to find out what steps have been taken on the bond. This must be done at the time of the trial, and certainly cannot be done after a period of several years has elapsed and the case gone to the Circuit Court of Appeals and come back for re-trial. The court by granting this motion would sacrifice the desire to terminate litigation within some reasonable time, to giving the attorney for the defense a possible chance of proving an issue which was never set up in the action.

IN CONCLUSION.

There was no dispute over the facts in this case and so there was no necessity for submitting it to a jury. There was little conflict over the law and so there was less necessity for an appeal. Most of the points have already been decided in our favor on the former appeal and they are more untenable now than they were at that time, because in addition to their being against the overwhelming weight of authority, they fall athwart the doctrines of *res adjudicata* and *stare decisis*. This is more in the nature of a petition by the defendant for a rehearing than an appeal and lacks the merit of presenting any cases in their favor which have been decided subsequent to the court's former ruling, or any alteration of circumstances except the elapse of a long period of time, which is an argument in our favor rather than theirs. The new points that are not merely collateral to and controlled by the former decision impress us as being unsound and non-negotiable on their face.

On account of all of these things we respect-

fully submit that the lower court should be sustained and this appeal dismissed.

Respectfully submitted,

CLAY ALLEN,

United States Attorney.

G. P. FISHBURNE,

Assistant United States Attorney.

2461
No. 2461

8

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK D. COOPER,
Defendant and Appellant,

VS.

UNITED STATES OF AMERICA,
Complainant and Appellee.

GEORGE HEATON,
Defendant, Not Joining in Appeal.

TRANSCRIPT OF RECORD.

**Upon Appeal from the United States District
Court for the District of Montana.**

JAMES A. WALSH,
Solicitor for Appellant, Helena, Montana.

HON. B. K. WHEELER, U. S. Attorney,
Solicitor for Appellee, Helena, Montana.

Filed

AUG 22 1914

F. D. Monckton,
Clerk.

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*In the District Court of the United States, in and
for the District of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

No. 948.

FRANK D. COOPER and GEORGE HEATON,

Defendants.

BE IT REMEMBERED, that on the 7th day of
December, 1909, complainant filed its Bill of Com-
plaint herein, in the words and figures following,
to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

FRANK D. COOPER and GEORGE HEATON,

Defendants.

IN EQUITY.

BILL OF COMPLAINT.

To the Honorable, the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana:—

The United States of America, by George W. Wickersham, Attorney-General of the United States, and James W. Freeman, United States Attorney for the District of Montana, brings this bill of complaint against Frank D. Cooper, a resident of the State of Montana, and George Heaton, a resident of the Southern District of the State of Iowa, the defendant herein, and thereupon your orator complains and says:

FIRST:

That on and prior to the 1 day of December, A. D. 1898, your orator was the owner in fee simple of those certain public lands situated in the state and district of Montana and within the Helena Land District, and now within the land district of which the land office is at Great Falls, Montana, and more

particularly described as follows: The North half of the northwest quarter of section Fourteen, and the east half of the northeast quarter of section fifteen, in township nineteen north range three west of the principal Montana Meridian, containing one hundred and sixty acres of land, situated, lying and being in the county of Cascade, state and district of Montana, and within the jurisdiction of this court.

That on the said 1 day of December, A. D., 1898, one Charles Gilbert, under and by virtue of the provisions of Section 2289 of the Revised Statutes of the United States, made and filed in the local land office of the United States, at Helena, in the State and District of Montana, his application No. 9785, to enter as a homestead the lands hereinabove described.

SECOND:

That at the time of the filing by the said Charles Gilbert, of his said homestead application No. 9785, to enter the above described lands and premises, and contemporaneously therewith, the said Charles Gilbert, likewise filed in the said local land office of the United States, as required by law, his affidavit and statement in writing under oath, in which, among other things, he stated and deposed that his said application to enter said land as a homestead was honestly and in good faith made for the purpose of actual settlement and cultivation, and that he would faithfully and honestly endeavor to comply with all the requirements of law as to said land, and the residence and cultivation necessary to acquire

title to said lands so applied for, and that he had not applied and did not apply to enter said lands for the purpose of speculation, but in good faith to make a home for himself. That thereupon the said Charles Gilbert then and there paid to the Receiver of the local land office of the United States, at Helena, Montana, the sum of sixteen dollars, the same being the proper and legal fee then and there due and payable to the said Receiver upon the filing of said application aforesaid. Whereupon the said Receiver of the said local land office then and there issued and delivered to the said Charles Gilbert his said receipt for the said amount of money so paid by him as aforesaid, and attached to, and connected with, the said receipt was and is a notation setting forth in detail the requirements of the law to be observed and complied with by the said Charles Gilbert, in order to obtain title to said lands so applied for by him as aforesaid, and to be entered by him, as follows, to-wit: "Note.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years of the expiration of the said five years, he must offer proof of his actual settlement and cultivation, failing to do which, his entry will be cancelled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it

with cash or land warrants, upon making proof of settlement and of residence and cultivation from the date of filing affidavit to the time of payment.”

THIRD:

That thereupon, in order to entitle the said Charles Gilbert to obtain and procure from the said United State a patent for said tract of land, under the homestead laws of the United States, it was incumbent upon said Charles Gilbert, and he was required to make actual settlement on said lands and reside thereon and cultivate the same for a period of five years from and after the filing in said local land office at Helena, Montana, of his said application and affidavit hereinbefore set forth, or in case said Charles Gilbert did not desire to remain upon said land the full period of five years, to make payment for the same at the expiration of fourteen months from and after the filing of said application and affidavit, upon making proof before the Register and Receiver of the said local land office of the United States, at Helena, Montana, of settling upon and the cultivation of said lands by said Charles Gilbert, from the date of filing said application and affidavit down to the time of making such payment. That thereafter, on the 15th day of June, A. D., 1904, the said Charles Gilbert appeared before C. H. Benton, then and there the Receiver of the United States Land Office at Great Falls, Montana, which said land office was then and there the proper local land office for making of final proof upon said homestead entry hereinbefore mentioned,

with his final proof witnesses, Charles Wise and William A. Mahaffey, and offered proof before the said Register and Receiver that he had settled upon said lands and premises and actually resided thereon and cultivated the same as required and within the meaning and intent of the said homestead laws of the said United States, and then and there gave, made out, and signed his deposition and swore to the same before the said C. H. Benton, Receiver of the United States Land Office at Great Falls, Montana, the said land office then and there being the proper United States Land Office of the land district wherein the said lands are situated, and then and there offered, presented, delivered and filed said affidavit, deposition and sworn statement so made, signed and sworn to by the said Charles Gilbert, to and with the said Register and Receiver of the said United States Land Office, as proof of the settlement and residence upon and the cultivation of the said lands by the said Charles Gilbert, as required by the law and the statute in such case made and provided, and the same were accepted by the said Register and Receiver of the said land office.

FOURTH.

And your orator sheweth unto your honors that the said Charles Gilbert, in said affidavit, deposition and sworn statement, made, signed, and sworn to by him, as aforesaid, and offered, presented, delivered to, and filed with, the said Register and Receiver, and accepted by them as proof of the settlement and residence of the said Charles Gilbert,

upon the said lands, and of the cultivation of the same by him, the said Charles Gilbert, among other matters and things, testified and deposed that he had actually resided on said lands continuously since June, 1899, and that he had placed improvements upon the said lands of the value of three hundred dollars, and that he had constructed a frame house fourteen feet by twenty feet, and had constructed a fence around said lands, and that he had built a chicken house and stable upon said lands, and that he had cultivated one and one-half acres of the said land, and that he, the said Charles Gilbert, procured from each of said final proof witnesses, William A. Mahaffey and Charles Wise, affidavits, depositions and sworn statements taken before the said C. H. Benton, as aforesaid, made, signed and sworn to by the said final proof witnesses before the said Receiver, as aforesaid, to the same effect and corroborative and in aid of the said affidavit, deposition and sworn statement made, signed and sworn to by the said Charles Gilbert, and filed the same, together with the said Charles Gilbert's own affidavit, deposition, and sworn statement, in the local land office of the United States, at Great Falls, and offered, presented and delivered the same to the said Register and Receiver of the said land office, together with his own affidavit, deposition and sworn statement, as proof of the settlement and residence upon and the cultivation of the said land by the said Charles Gilbert, as required by law, and all of the said affidavits, depositions and sworn statements

of the said Charles Gilbert and of his said final proof witnesses, so made, signed and sworn to, as aforesaid, and offered, presented, delivered to, and filed with, the said Register and Receiver of the said land office, as aforesaid, were, and each of them was, then and there taken and accepted by the said Register and Receiver of the said land office as proof of the settlement and residence of the said Charles Gilbert upon the said lands.

That thereafter, on the 18 day of June, A. D. 1904, the said Charles Gilbert paid to the Receiver of the said United States Land Office, at Great Falls, Montana, the sum of six dollars, being the balance of payment for said land, as required by law, and thereupon the said Receiver then and there issued to the said Charles Gilbert, his final receipt No. 686, for the said money so paid to him by the said Charles Gilbert, in payment for said lands, as aforesaid, and the Register of the said land office likewise then and there issued to the said Charles Gilbert his certificate No. 686 for said lands, certifying that in pursuance of law, the said Charles Gilbert had purchased said land and upon presentation of said certificate to the Commissioner of the General Land Office, the said Charles Gilbert should be entitled to receive a patent for said lands hereinbefore more particularly mentioned and described. That thereafter, such proceedings were had that on the 31 day of December, A. D., 1904, a patent was issued to the said Charles Gilbert, for the said lands, which patent was duly delivered to

the said defendant, and received by him.

FIFTH:

And your orator further sheweth unto your honors that the said acceptance of the said affidavits, depositions, and testimony of the said Charles Gilbert, and of his said final proof witnesses, William A. Mahaffey and Charles Wise, as proof of the settlement and residence of the said Charles Gilbert, upon said lands, and the cultivation of same by him, as required by law, by the said Register and Receiver, and the issuance by the said Receiver of the said final receipt, and the issuance by the said Register of the said certificate of purchase, as hereinabove mentioned and set forth, and the issuance of the said patent for the said tract of land by the United States, were had and done by the said officers of the said United States, in reliance by them, and each of them, upon the truth of the testimony and statements contained in the affidavits and depositions of the said Charles Gilbert, and in reliance by them, and each of them, upon the truth of the testimony and statements contained in the affidavits and depositions of the said final proof witnesses, William A. Mahaffey and Charles Wise, and in reliance upon the good faith of the said Charles Gilbert, and his said final proof witnesses in the premises, and not otherwise.

SIXTH:

That the said affidavit and deposition of the said Charles Gilbert, and the affidavits and depositions of the said final proof witnesses, William A. Ma-

haffey and Charles Wise, were, and each of them was, then and there false, fraudulent and untrue, as was then and there well known to the said Charles Gilbert, and to each of the said final proof witnesses, and made with intent to deceive the officers of the United States, and with intent to fraudulently obtain patent to the said lands hereinabove described, and by fraud and deceit to procure a patent to the said lands by means of false and fraudulent testimony and statements, made and contained in the said affidavits and depositions and testimony, in this, to-wit: That the said Charles Gilbert had not established and did not establish residence upon said lands, or any part or portion thereof during the month of March, 1899, or at any other time, or at all, and that the said Charles Gilbert had not, at the time of making said final proof and the filing of the same in the said land office, resided on said lands or any part or portion thereof, continuously, or in any other manner, or at all, since the month of March, 1899, or at any other time, and had not then, or at any other time, built a frame house, fourteen by twenty feet, and that the said Charles Gilbert had not enclosed said lands with a fence, and that the said Charles Gilbert had not built a chicken house and stable upon said lands, and that the said Charles Gilbert had not cultivated one and one-half acres of the said lands, and that the said Charles Gilbert had not then and there, or at any other time, or at all, improvements upon the said lands of the value of three hundred dollars, or any other value or

amount whatsoever. That your orator alleges the fact to be that the said Charles Gilbert did not make a settlement upon said lands, or any part or portion thereof, and did not establish his residence upon said lands, or any part or portion thereof, during the month of March, 1899, and that the said Charles Gilbert did not cultivate any part or portion thereof from March, 1899 to the time of filing said final proof or at any other time, or at all, and that the said Charles Gilbert did not have improvements upon said lands of the value of three hundred dollars, or any other value whatever, and that each and every of the said statements so made by the said Charles Gilbert and his said final proof witnesses, as hereinbefore specifically mentioned and set forth, and which are contained in the said affidavits, depositions and testimony to prove settlement and residence by the said Charles Gilbert upon said lands, and the cultivation by the said Charles Gilbert of the same, as required by the homestead laws of the United States, are utterly false, fraudulent and untrue in every particular, as he, the said Charles Gilbert, then and there well knew.

SEVENTH:

And your orator further charges and alleges that the said testimony of the said Charles Gilbert, as contained in said affidavit and deposition of the said Charles Gilbert, and the testimony of his said final proof witnesses, William A. Mahaffey and Charles Wise, as contained in said affidavits and depositions made by them, as aforesaid, was false,

fraudulent and untrue in the respects and in the several particulars as hereinbefore set forth, and the same were made, offered, presented and filed as proof of the settlement and residence by the said Charles Gilbert upon said lands, and the cultivation of the same, as aforesaid, for the false and fraudulent purpose of imposing upon and deceiving the Register and Receiver of the said United States Land Office, at Great Falls, Montana, and to cause and induce the said officers and agents of your orator to believe said testimony contained in said affidavits and depositions was true, and that the said Charles Gilbert had, in fact, made and established settlement and residence upon said tract of land and had cultivated the same in the manner and to the extent and for and during the period of time as therein stated, by the said Charles Gilbert, and his said final proof witnesses, William A. Mahaffey and Charles Wise, were wholly deceived and misled into allowing said proof to be filed and accepted, and in permitting the issuance of said final receipt and the issuance of said certificate of purchase to said lands and of the United States patent therefor, by the officers of the United States, as hereinbefore set forth, and delivering said patent to the said Charles Gilbert.

NINTH:

And your orator further sheweth unto your honors that since the issuance of said final receipt and certificate and patent for said lands to the said Charles Gilbert, the said Charles Gilbert heretofore,

to-wit, on July 15, 1904, deeded and conveyed by warranty deed the said lands to the said defendant, Frank D. Cooper, and that the said defendant, Frank D. Cooper, is now in the occupancy, possession and enjoyment of the said lands and premises, but your orator alleges that by whatever pretended right or title the said Frank D. Cooper now holds possession of or occupies the said land, the same is wholly void and ineffectual as against the rights of your orator; that the existence of said patent so fraudulently obtained and procured by the said Charles Gilbert, as hereinbefore set forth, on its face entitled the said Charles Gilbert, and those claiming under him, to exercise the right of absolute ownership on and over the said lands, and assert a legal title to the same, to which the defendant is not entitled; that if the said patent remains uncanceled and in force, the same may be used in fraud of your orator and all persons relying thereon, as a valid and substantial conveyance of the legal title to said lands and premises.

TENTH:

And your orator further avers and charges that the said defendant, Frank D. Cooper, was not a purchaser in good faith and for a valid consideration of the lands herein involved; but if he purchased at all, purchased the same with full and complete knowledge that they were entered in fraud and in violation of the laws of the United States by his said pretended grantor, Charles Gilbert, against the legal and equitable rights of the complainant; that

said pretended purchase is void and should be so decreed in equity in favor of this complainant and against the said defendant, Frank D. Cooper.

ELEVENTH:

And your orator further showeth unto your hon-
ors that on or about the 13th day of December, 1909,
the said defendant Frank D. Cooper and his wife,
Alice G. Cooper executed and delivered to the de-
fendant George Heaton their contract in writing by
which they agreed and bound themselves to convey
to the said defendant George Heaton all of their
rights, title and interest in and to the lands herein
first above described; and your orator further
showeth that the said defendant George Heaton by
reason of the execution of said contract now claims
some right, title and interest in and to the said lands
adverse to the rights of the complainant therein, but
your orator alleges that whatever interest the said
George Heaton now claims to have in said lands was
received and accepted by him with full knowledge of
the fraud so perpetrated upon this complainant in
the procurement of said patent, and that he is not a
bona fide purchaser for value without notice of
said fraud, and in equity and in good conscience said
contract, insofar as it affects the lands herein in-
volved, should be cancelled and held for naught.

All of which actions, doings, and pretenses of the
defendants are contrary to equity and good con-
science, and tend to the manifest wrong, injury and

oppression of this complainant in the premises.

IN CONSIDERATION WHEREOF, and for as much as the complainant is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, and,

TO THE END, THEREFORE, that the said defendants, Frank D. Cooper and George Heaton, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged but not under oath (an answer under oath being hereby expressly waived) as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated; and to the end that the said defendants and all and singular his agents, employes, and servants may be forthwith and forever restrained and enjoined from setting up and asserting or claiming any rights, privileges, benefits, or advantages under and by reason of said patent or said pretended deed of conveyance, or said agreement to sell said lands, herein before mentioned; and to the end that said patent so issued by the complainant to the said Charles Gilbert may be declared void and cancelled; and that said pretended deed of conveyance from the said Charles Gilbert to the defendant, Frank D. Cooper, may be, by decree of this Honorable Court, treated as a cloud upon the title of complainant to all and singular the lands at Paragraph I herein described, and

the same removed as such; and that said agreement so entered into between the defendant Frank D. Cooper and his wife and the defendant George Heaton, insofar as the same affects the title to the lands herein involved, be cancelled and held for naught; And that the legal and equitable title thereto and the right of possession thereof be restored and given to the complainant; and that the complainant have such other and further relief in the premises as the circumstances of this cause may require, and as to this Honorable Court may seem meet and proper, and as shall be agreeable to equity and good conscience.

May it please your Honors to grant unto the complainant the Writ of Subpoena to be directed to the said Frank D. Cooper, and George Heaton, thereby commanding him at a certain time and under a certain penalty, therein to be specified, personally to be and to appear before this Honorable Court, and then and there to answer all and singular the premises, and to stand to and abide such further order, direction or decree therein as to this Honorable Court may seem meet.

(Signed) GEORGE W. WICKERSHAM,
Attorney-General of the United States.

JAS. W. FREEMAN,
United States Attorney, District of Montana.

UNITED STATES OF AMERICA,

District of Montana,—ss.

JAMES W. FREEMAN, being first 'duly sworn, deposes and says that he is the regularly appointed, qualified, and acting United States Attorney for the District of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated and alleged are true to the best of his knowledge, information and belief.

(Signed) JAS. W. FREEMAN,

Subscribed and sworn to before me this 7 day of December, 1909.

(Signed) GEO. W. SPROULE,

Clerk U. S. Circuit Court, District of Montana.

(Endorsed: Filed December 7, 1909, Geo. W. Sproule, Clerk.)

NOTE BY CLERK:

The parts underscored are amendments to the original bill, allowed by the Court under order of May 23rd, 1912, hereinafter set forth.)

Thereafter, on December 7, 1909, subpoena in equity was duly issued herein as follows, to-wit:

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial
Circuit, District of Montana.*

IN EQUITY.

TO THE PRESIDENT OF THE UNITED
STATES OF AMERICA, GREETING:

TO,

FRANK D. COOPER, Defendant:

YOU ARE HEREBY COMMANDED, That you be and appear in said Circuit Court of the United States aforesaid, at the Court Room in FEDERAL BUILDING, HELENA, MONTANA, on the 3rd day of JANUARY, A. D., 1910 to answer a Bill of Complaint exhibited against you in said Court by THE UNITED STATES OF AMERICA, Complainant, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS: The Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 7th day of Dec., in the year of our Lord one thousand nine hundred and nine and of our Independence the 42.

(SEAL). (Signed) GEO. W. SPROULE,
Clerk.

Memorandum, pursuant to Rule 12, Supreme Court,
U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above suit, on or before the first Monday of January next, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

GEO. W. SPROULE, Clerk.

Geo. W. Wickersham, U. S. Atty. Gen.,
Washington, D. C., J. W. Freeman,
U. S. Atty., Solicitor for Complainant.
Helena, Montana.

(Service of the within subpoena accepted for defendant, and copy thereof received this 18th day of December, 1909.

JAMES A. WALSH,

Attorney for Defendant.

(Endorsed, filed, December 20th, 1909, Geo. W. Sproule, Clerk.)

Thereafter, on March 29, 1910, defendant Cooper filed his answer herein, as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

ANSWER TO BILL OF COMPLAINT.

This defendant, now and at all times hereafter, saving to himself, all, and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections, in the said Bill of Complaint contained, for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for him to make answer to, answering says:

I.

Admits that complainant was on the first day of December, 1898, the owner of said lands mentioned and described in the complaint, and that Charles Gilbert made and filed in the local land office his application to enter said lands as a homestead.

II.

Admits that the said Charles Gilbert filed an affidavit in the local land office, setting forth the matters and things required by law to be set forth in such cases made and provided; and that he paid the legal fee, required and that the Receiver of said land office issued to him a receipt in the form required by law.

III.

Admits that it was incumbent upon said Charles Gilbert to comply with the law, as to residence and cultivation upon said land to acquire title thereto.

IV.

Admits that on or about the 5th day of June, 1904, the said Charles Gilbert offered proof of his settlement and residence upon said lands, and presented affidavit in compliance with the law, showing the matters and things necessary to acquire title thereto.

V.

Admits that said Charles Gilbert presented a sworn statement that he had actually settled upon said land and resided thereon since June, 1899, within the meaning and intent of the homestead laws, and placed improvements upon said land to the

value of Three Hundred Dollars, and constructed a frame house, fourteen by twenty feet and had constructed a fence around some of the land, built a chicken house and stable, and cultivated one and one-half acres of said land; and that said affidavit was also corroborated by the affidavits of William A. Mahaffey and Charles Wise; and that said proof was accepted by the Register and Receiver of said land office, and that said officers issued to him a certificate thereof, as provided by law, which entitled said Charles Gilbert to receive a patent for said land; and that thereafter such proceedings were had that on the 31st day of December, 1904, a patent was issued and delivered for said land; and denies all other matters and things contained in paragraph three of the Bill of Complaint.

VI.

That whether or not the said officer of said land office accepted or relied upon said affidavits of said Charles Gilbert, William A. Mahaffey and Charles Wise, or relied upon any reports made by the special agents of the Land Department, this defendant denies that he has any knowledge or information thereof sufficient to form a belief; but denies that the affidavits or depositions of said Charles Gilbert, William A. Mahaffey or Charles Wise were false, fraudulent, or untrue, or that the matters and things stated in said affidavits were known to be false, fraudulent or untrue by the said Charles Gilbert, William A. Mahaffey or Charles

Wise, or that said affidavits were made with the intent to defraud said land office; or to procure patent by means of false or fraudulent testimony made or contained in said affidavits; denies that the said Charles Gilbert had not established his residence upon said land, or that he had not resided upon the same, or that he had not built a house thereon of the size and dimensions stated, or that he had not enclosed the land with a fence to the extent stated in the said affidavit, or that he had not built a chicken house or stable thereon, or that he had not cultivated one and one-half acres of said land; and denies that the matters and things set forth in the depositions of said Charles Gilbert, William A. Mahaffey or Charles Wise, were, or are, false or untrue; and denies each and every other allegation in paragraphs four, five, and six of the Bill of Complaint.

VII.

Denies that the matters and things set forth in the affidavits and depositions of the said Charles Gilbert, William A. Mahaffey or Charles Wise were false, fraudulent or untrue, in respect to the several, or any of the matters therein stated, or that the same was offered or presented for the purpose of deceiving the Register and Receiver of said land office, or to defraud the United States of the said lands; and denies each and every other allegation in Paragraph seven in the Bill of Complaint contained.

VIII.

Admits that some time after the issuance of said final receipt, the said Charles Gilbert deeded and conveyed the said lands to this defendant, and that this defendant is now the owner and in possession thereof; but denies that the right and title of this defendant in and to said lands is wholly, in any manner, or at all void, or ineffectual, as against the right of the complainant; and denies that the said patent was fraudulently obtained.

IX.

Admits that said patent on its face entitled the said Charles Gilbert and those claiming under him to exercise the right of absolute dominion and ownership over said lands and assert legal title to the same; But denies that this defendant is not entitled to assert ownership and legal title to said premises, and denies said patent is, or can be used in fraud of any rights of the complainant; and denies each and every other allegation in paragraph nine of the Bill of Complaint.

X.

Denies that this defendant is not a purchaser in good faith, for a valuable consideration of the lands and premises described in the complaint; and denies that he purchased the same with full, complete or any knowledge that they were entered in fraud or in violation of the laws of the United States by said Charles Gilbert; and denies that the said purchase is void, or that it should be so decreed, and

denies that said premises were entered, or patent procured in fraud or violation of the laws of the United States.

XI.

And defendant avers that he purchased said lands in good faith and paid a valuable consideration therefor, and at the time he purchased said lands he believed and now believes that the said Charles Gilbert entered said lands and procured title thereto in good faith, and had in all things complied with the laws of the United States; and defendant avers that he did not have any notice or knowledge that the said Charles Gilbert had not, or that the complainant herein claimed that he had not, in all things and in good faith complied with the laws of the United States, with reference to settling, residing upon and acquiring title to said land.

XII.

And defendant further avers that all the acts and deeds of the said Charles Gilbert, with reference to establishing residence, residing upon and making improvements upon said land were such that the complainant herein could, with ordinary diligence, through its officers and agents, who were then employed in that business, and before the final proof was made, or certificate issued, have ascertained whether or not the said Charles Gilbert had in all things complied with the law, with reference to settlement, residence, cultivation and improvements on said land necessary to acquire title thereto; and

if any matters or things stated in said affidavits or depositions of said Charles Gilbert or said witnesses were not true, the officers of said land office could have refused to accept final proof and to issue certificate therefor, or patent for said lands, and that complainant by reason of the negligence and laches of its officers is now estopped from asserting any right, title, claim or interest in or to the said lands against this defendant.

XIII.

And defendant avers that since he purchased said land, and before the commencement of this suit, he in good faith entered into a contract with George Heaton, and in good faith sold said land to said Heaton for a valuable consideration, and said Heaton in good faith and for a valuable consideration, and without any notice of the claim of the complainant herein to said land, or any claim that the said Gilbert had not in all things complied with the law in obtaining title to said land, and without any knowledge of any wrong doing, or a claim of wrong doing on the part of the said Charles Gilbert, purchased the said lands from this defendant.

XIV.

And this defendant denies all and all manner of unlawful combination, confederacy and wrong doing wherewith he is by the said Bill charged, without this, that there is any other matter, cause or thing in said complainant's Bill of Complaint contained, material or necessary for this defendant to make

answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the best of the knowledge of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) JAMES A. WALSH,
Solicitor for Defendant.

Service of the foregoing admitted and copy thereof received this 29 day of March, 1910.

J. W. FREEMAN,
United States Attorney.

(Endorsed Filed March 29, 1910, Geo. W. Sproule, Clerk.)

Thereafter, on March 30, 1910, Replication was filed therein as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

REPLICATION.

This Replicant, saving and reserving to itself all and all manner of advantage of exception which may be had an taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered

unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant without that that any other matter or thing in said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true, all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct and humbly as in and by its said bill, it has already prayed.

JAMES W. FREEMAN,

United States Attorney.

(Service accepted March 30, 1910, James A. Walsh, Solicitor for Defendant.)

(Endorsed, Filed March 30, 1910, Geo. W. Sproule, Clerk.)

Thereafter, on May 23, 1912, an order allowing amendments was duly made and entered herein, as follows, to-wit:

*In the District Court of the United States in and for
the District of Montana.*

Nos. 946, 947 and 948, United States vs. Frank D. Cooper.

These causes, heretofore submitted to the Court, came on regularly at this time for the decision of the court; whereupon it is ordered that the complainant be allowed to amend its bill of complaint in each of the above entitled causes by adding the name of George Heaton as party defendant, by interlineation

as far as feasible, and by attaching a separate paragraph to properly state the case as to him, and thereupon complainant may have other subpoenas issued and proceed to service thereof upon Heaton.

Thereafter the actions may proceed as the parties are advised.

Entered, in open court, May 23, 1912.

GEO. W. SPROULE, Clerk.

Thereafter, on June 19, 1912, Notice and Amendments were filed herein, being as follows: to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

NOTICE AND AMENDMENTS.

TO J. A. WALSH, ESQ., Attorney for the above named defendant, and FRANK D. COOPER, Defendant in the above entitled action:

You and each of you will please take notice that the complainant in the above entitled action did on the 14th day of June, 1912, amend its bill of complaint in accordance with an order of the Honorable George M. Bourquin filed and entered on May 23, 1912, by then and there making the following interlineations and insertions:

1. Page 1, lines 7 and 8, by adding "and George Heaton."

2. Page 1, line 8 by adding the letter "s" to the word defendant.

3. Page 1, line 16, after the word "Montana", by adding "and George Heaton, a resident of the Southern District of the State of Iowa."

4. Page 12, between lines 22 and 23, by adding Paragraph eleven which is as follows:

“ELEVENTH”

And your orator further showeth unto your honors that on or about the 13th day of December, 1909, the said defendant, Frank D. Cooper and his wife Alice G. Cooper executed and delivered to the defendant George Heaton their contract in writing by which they agreed and bound themselves to convey to the said defendant George Heaton all of their right, title and interest in and to the lands herein first above described; and your orator further showeth that the said defendant George Heaton by reason of the execution of said contract now claims some right, title and interest in and to the said lands adverse to the rights of the complainant therein, but your orator alleges that whatever interest the said George Heaton now claims to have in said lands was received and accepted by him with full knowledge of the fraud so perpetrated upon this complainant in the procurement of said patent, and that he is not a bona fide purchaser for value without notice of said fraud, and in equity and good conscience said contract, insofar as it affects the lands herein involved, should be cancelled and held for naught.”

5. Page 12, line 24, by adding the letter “s” to the word “defendant.”

6. Page 12, line 32, by adding the letter “s” to the word ‘defendant’.

7. Page 12, line 33, by adding “and George Heaton.”

8. Page 13, line 5, by striking out the word "he", and inserting in lieu thereof the word "they."

9. Page 13, line 6, by adding the letter "s" to the word "defendant."

10. Page 13, line 7, by striking out the word "his" and inserting in lieu thereof the word "their".

11. Page 13, line 11, by inserting after the word "conveyance" the following, "or said agreement to sell said lands, hereinbefore mentioned."

12. Page 13, line 19, after the word "such" by inserting, "and that said agreement so entered into between the defendant Frank D. Cooper and his wife and the defendant George Heaton, insofar as the same affects the title to the lands herein involved, be cancelled and held for naught."

13. Page 13, line 29, by adding "and George Heaton."

All of which will fully appear from the original bill of complaint on file in the office of the Clerk of the United States District Court, District of Montana, to which reference is hereby made.

Dated this 19th day of June, 1912.

EDWARD A. LaBOSSIERE,

Assistant U. S. Attorney

District of Montana.

Due service of the within notice acknowledged and true copy thereof received this 19th day of June, 1912.

JAMES A. WALSH,

Attorney for defendant.

(Endorsed filed, June 19, 1912. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy.)

Thereafter, on Sept. 17, 1912, an Order was duly entered herein, as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

ORDER.

It having been made to appear in the above entitled cause that the defendant George Heaton is not a resident of and within the state and district of Montana, but that the said defendant is a resident and inhabitant of St. Paul, in the district of Minnesota, and that personal service of process of this court cannot be had or obtained upon said aforementioned defendant within the district of Montana, and application having been made to this Court pursuant to Section No. 8, of the Act of March, 3, 1875, for an order of this court requiring and directing the said defendant to appear, plead, answer or demur to said complainant's bill of complaint on file herein by a day certain to be fixed and designated by this court;

Now, therefore, it is **ORDERED** that said application, be, and the same is, hereby granted, and you, the said George Heaton, one of the defendants in the above entitled cause, are hereby ordered and required and directed to be and appear in the district court of the United States, District of Montana, in the City of Helena, in the district of Montana, on the 4th day of November, 1912, and then

and there to plead, answer or demur to complainant's bill of complaint exhibited against you in said court by the said complainant, the United States of America, to which said bill of complaint you are hereby referred, and to receive what said court shall have considered in that behalf.

Dated this 17th day of September, 1912.

(Signed) FRANK S. DIETRICH,
Judge.

(Entered Sep. 17, 1912, Geo. W. Sproule, Clerk, By Harry Dunn, Deputy. Filed October 2nd, 1912, Geo. W. Sproule, by C. R. Garlow, Deputy.)

RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA,
District of Minnesota,—ss.

I hereby certify and return that I served the annexed Order on the therein-named George Heaton by handing to and leaving a true and correct copy thereof with him, personally at St. Paul, in said District on the day of September, A. D. 1912.

WILLIAM H. GRIMSHAW,
U. S. Marshall.
By GEO. W. WELLS, Deputy.

Thereafter, on Dec. 2, 1912, the Answer of defendant Heaton was filed herein, being as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

IN EQUITY.

SEPARATE ANSWER OF DEFENDANT
GEORGE HEATON.

The answer of George Heaton, one of the defendants to the bill of complaint as amended of the above named complainant:

This defendant, ^{all} now and at all times hereafter, saving to himself and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

1. This defendant admits the allegations contained in paragraphs numbered First to Fifth, both inclusive, of complainant's bill of complaint as amended.

2. This defendant has no knowledge or information as to the truth or falsity of any of the allegations contained in paragraphs numbered Sixth, Seventh and Eighth of said bill of complaint as amended, and can not set forth at to his belief or otherwise, whether or not any of said allegations are true, and calls for proof thereof.

3. This defendant has no knowledge or information as to the truth of falsity of any of the allegations contained in paragraph Numbered Ninth of

said bill of complaint as amended, and cannot set forth as to his belief or otherwise whether or not any of said allegations are true, and calls for proof thereof, except that this defendant admits that the said Charles Gilbert, on the 15th day of July, 1904, deeded the lands mentioned and described in paragraph numbered First of the said bill of complaint as amended, to the said defendant Frank D. Cooper; but this answering defendant says that the said Frank D. Cooper is not now in the occupancy, possession and enjoyment, or either thereof, of said lands and premises; but that this defendant was in the occupancy, possession and enjoyment of said lands from the 1st day of August, 1910, until the 22nd day of April, 1911, under and by virtue of a contract for the sale of said lands executed and delivered to this defendant on the 13th day of December, 1909, by said defendant Frank D. Cooper and Alice G. Cooper, his wife; and that ever since the 22nd day of April, 1911, the said lands have been and still are in the occupancy, possession and enjoyment of the Great Falls Farm Land Company, a Montana corporation, under and by virtue of an assignment of the contract above mentioned, executed and delivered to the said Great Falls Farm Land Company by this defendant on the said 22nd day of April, 1911; and that the right or title by which this said defendant so held possession and occupied said lands was, and the right to title by which said Great Falls Farm Land Company now holds possession

and occupies said lands is, valid and effectual as against the rights of complainant; and that this defendant was, from the 1st day of August, 1910, until the 22nd day of April, 1911, and the said Great Falls Farm Land Company now is entitled to exercise the right of absolute ownership on and over said lands, and to assert a legal title to the same; and that this defendant does not believe that, if the said patent remains uncanceled and in force, the same may be used in fraud of the complainant and all persons relying thereon, as a valid and substantial conveyance of the legal title to said lands and premises.

4. That this defendant has no knowledge or information as to the truth or falsity of any of the allegations contained in paragraph numbered Tenth of said bill of complaint as amended, and cannot set forth as to his belief or otherwise, whether or not any of said allegations are true, and calls for proof thereof, except that this defendant does not believe that the said defendant Frank D. Cooper was not a purchaser in good faith and for a valid consideration of the lands, herein involved; and does not believe that the said defendant Frank D. Cooper purchased the said lands with full and complete knowledge, or any knowledge at all, that they were entered in fraud or in violation of the laws of the United States by the said Charles Gilbert, against the legal and equitable rights of the complainant; and does not believe that said purchase by said defendant Frank D. Cooper is void and should be so

decreed in equity in favor of said complainant and against the said defendant Frank D. Cooper, or against this defendant or his successors in interest.

5. This defendant has no knowledge or information as to the truth or the falsity of any of the allegations contained in paragraph numbered Eleventh of said bill of complaint as amended, and cannot set forth as to ~~this~~ belief or otherwise, whether or not any of said allegations are true, and calls for proof thereof, except that this defendant admits that on or about the 13th day of December, 1909, the said defendant Frank D. Cooper and his wife, Alice G. Cooper, executed and delivered to this defendant their contract by which they agreed and bound themselves to convey to this defendant all their rights, title and interest in and to the lands herein involved; and this defendant says that he procured the execution and delivery of said contract in good faith and for a valuable consideration; and that he, by reason of the execution and delivery of said contract, had, from the 1st day of August, 1910, until the 22nd day of April, 1911, and that the said Great Falls Farm Land Company had, ever since said 22nd day of April, 1911, and now has, the right of absolute ownership over, in and to said lands; and that the interest heretofore asserted and claimed by this defendant in said lands was acquired by him under the contract hereinabove referred to, and without any knowledge of any fraud in any manner perpetrated upon said complainant in the procurement of the said patent; and that this

defendant was a bona fide purchaser for value without notice of any fraud; and that this defendant does not believe that, in equity and good conscience, said contract, in so far as it affects the lands herein involved, should be cancelled and held for naught.

6. For further answer and defense to the said bill of complaint as amended, this answering defendant avers and says: That on the 13th day of December, 1909, this defendant made and entered into a contract in writing with said defendant Frank D. Cooper and Alice G. Cooper, his wife, wherein and whereby said Frank D. Cooper and Alice G. Cooper, his wife, sold and agreed to convey, in fee simple by warranty deed, to this defendant, the north half of the northwest quarter of section fourteen, and the east half of the northeast quarter of section fifteen) township nineteen north of range three west of the Montana principal meridian, containing one hundred and sixty (160) acres, situate, lying and being in the County of Cascade, State and District of Montana, together with other lands situate in the counties of Cascade and Lewis and Clark in said State and District of Montana; that in and by said contract this defendant agreed and bound himself to pay to said Frank D. Cooper and Alice G. Cooper, his wife, the sum of five and 70/100 Dollars (\$5.70) per acre for all of said lands mentioned in said contract, including the lands herein involved, in certain specified installments, which sum was the full value of the lands and premises by said contract agreed to be

conveyed; that this defendant and his successor in interest under said contract, the said Great Falls Farm Land Company, have fully paid all the installments due under said contract up to this time, and are legally bound to pay the balance thereof; that, under the terms and provisions of said contract, possession of the lands herein involved was given to this defendant on the 1st day of August, 1910, and that upon said date this defendant entered into the occupancy, possession and enjoyment of the said lands. And this defendant further says that he did not, at the time of the execution of the contract hereinbefore mentioned, or at any other time, have any knowledge, information or notice of any fraud or improper conduct in reference to procuring a patent to said lands; that under the terms and provisions of said contract, and by virtue of the full performance on the part of this defendant of all the covenants therein contained by him to be kept and performed, up to the 22nd day of April, 1911, this defendant became and was a bona fide purchaser of said lands for a valuable consideration.

And this defendant further says that he did, on the 22nd day of April, 1911, for a valuable consideration, sell, assign, transfer and set over to the Great Falls Land Company, a Montana corporation, the above mentioned contract and all of his right, title and interest therein and thereunder.

7. And this defendant, in addition to the foregoing answer avers that the cause of action, if any there may be arising to the complainant on account

or by reason of the several allegations and complaints in its said bill contained, did not accrue within six years before the said bill was filed and subpoena thereunder served upon this defendant; and this allegation defendant makes in bar of the complainant's bill and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

WHEREFORE, this defendant having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint as amended material to be answered, according to his best knowledge and belief, humbly prays this honorable court to enter its decree that this defendant be dismissed with his reasonable costs and charges in his behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable court may seem meet and in accordance with equity.

GEORGE HEATON.

By E. C. DAY,
His Solicitor.

DAY & MAPES,

Solicitors and of counsel for
the defendant George Heaton.

Helena, Montana, Dec. 1, 1912.

(Endorsed: Filed Dec. 2nd, 1912, Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy.)

Thereafter, on Dec. 23, 1912, Replication was filed herein as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

REPLICATION TO SEPARATE ANSWER OF
GEORGE HEATON.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, and for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

(Signed) J. W. FREEMAN,
United State Attorney
District of Montana.

Due service of the within replication acknowledged and true copy thereof received this 23rd day of December, 1912. Day & Mapes, Attorneys for Defendants.

(Endorsed: Filed Dec. 23, 1912, Geo. W. Sproule,

Clerk, By C. R. Garlow, Deputy.)

Thereafter, on January 28th, 1914, Decree was filed and entered herein, as follows, to-wit:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

DECREE.

This cause came on to be heard at this term, to-wit, on the 15th day of January, 1914, upon the pleadings and the proof, and was argued by counsel, and

It appearing to the court that a bill in equity was filed in this court on the 7th day of December, 1909, against the defendant, Frank D. Cooper, and that subpoena was duly issued; that thereafter said defendant filed his answer to said bill of complaint, and

It further appearing that by an order of this court made on the 23rd day of May, 1912, the said George Heaton was made a party to said suit; that notice was duly issued and served upon said defendant, George Heaton, and that thereafter, on the 2nd day of December, 1912, said George Heaton filed his answer herein, and

It further appearing, and the court finds, that the patent to the following described land, to-wit: The North half of the northwest quarter of section fourteen, and the east half of the northeast quarter of section fifteen, township nineteen north, range three west of Montana principal meridian, containing one hundred sixty acres of land, situate, lying and being

in the county of Cascade, state and district of Montana, was fraudulently procured by Charles Gilbert; that the said Frank D. Cooper is not and was not a bona fide purchaser of said land for value without notice of the fraud perpetrated upon complainant, and,

It further appearing that by the terms of a certain contract in writing dated December 13, 1909, the said defendant, Frank D. Cooper, agreed to sell, and the said defendant, George Heaton, agreed to buy, said lands, the purchase price thereof to be paid in installments covering some six years, and upon payment in full said Frank D. Cooper is to convey said land by warranty deed to said defendant, George Heaton; that more than six years has expired from the date of the issuance of said patent to the date of service of notice upon said George Heaton, and that the cancellation of said patent has become impracticable since said suit has been brought, and

It further appearing that the value of said land, at the date of the execution of said contract, was five and 70/100 dollars (\$5.70) per acre, and that complainant is entitled to the value thereof, and the court being fully advised in the premises;

IT IS ORDERED, ADJUDGED and DECREED that the said complainant, the United States of America, do have and recover of and from the said defendant, Frank D. Cooper, the sum of Nine hundred twelve dollars (\$912), with interest thereon at the rate of eight per cent per annu, from the 13th day of December, 1909, amounting to three

hundred and 96/100 dollars (\$300.96), making a total of twelve hundred twelve and 96/100 dollars (\$1212.96), together with its costs incurred herein taxed at -----, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that unless said amount is paid by the defendant, Frank D. Cooper, the said defendant, George Heaton, shall pay the same to complainant from the unpaid purchase money owing by the said George Heaton to the said defendant, Frank D. Cooper, upon his said contract of purchase of said lands, when said George Heaton was made a party thereto and appeared herein, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that such payment, if made by the said defendant, George Heaton, shall discharge said purchase price to the extent thereof, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that complainant have a lien for the sum of twelve hundred and twelve and 96/100 dollars (\$1212.96), and its costs herein incurred taxed in the amount of ----- upon the above described land as security and foreclosure thereof.

GEO. M. BOURQUIN,
Judge.

(Endorsed: Filed January 28, 1914. Geo. W. Sproule, Clerk.)

WHEREUPON, said pleadings, process and final degree are entered of final record herein, in accordance with the law and the practice of this court.

WITNESS my hand and the seal of said court at Helena, Montana, this 28th day of January, A. D. 1914.

(SEAL)

GEO. W. SPROULE,

By C. R. Garlow,

Deputy Clerk.

(Endorsed: Filed, January 28th, 1914. Geo. W. Sproule, Clerk, By: C. R. Garlow, Deputy Clerk.)

BE IT REMEMBERED That this cause came on for hearing on the 30th day of June, 1910, before Hon. O. T. Crane, Standing Examiner in Chancery, at Helena, Montana, and the following proceedings had:

Edgar S. Foley, being duly sworn, and interrogated by Mr. Skinner, counsel for plaintiff, testified as follows:

“My name is Edgar S. Foley. I am 39 years of age; reside at Helena, Montana; occupation, Special Agent of the General Land Office. Have occupied that position for six years, and during all that time was in Montana. Prior to that I was stock breeding and ranching in North Dakota; went into that business about the year 1888. I made an examination of the Charles Gilbert homestead entry, described as follows: N $1\frac{1}{2}$, NW 4, Section 14; E 2, NW 4 Section 15, Township 19 North, Range 3 West, Montana meridian, on the 25th day of September, 1906. I was instructed to do so by our Chief of Division, or Special Agent in Charges. There was no one living on the land at that time. There was nothing

in the way of improvements, that is buildings, plowing, and fencing. I had a conversation with Mr. Gilbert. I saw him on one or two occasions, and saw him at the time I made this examination.

Q. State what conversation you had with him with reference to his living on the entry, and as to what had become of the improvements on the entry?

BY MR. WALSH: We object to that on the ground that it is incompetent, irrelevant, and immaterial, because it does not appear that M. Gilbert was at that time the owner of the land, in that appears by the pleading in this case, that he made final proof on or about the fifteenth day of June, 1904, and that the land was thereafter subject to sale, and it doesn't appear that he had a particle of title at the time of the alleged conversation.

(Objection over-ruled, to which defendant excepted.)

A. Why, he said he had lived there some, and that the cabin had been subsequently moved to another claims.

He further said that, when Mr. Cooper bought these claims that he moved the cabins to other claims. My business as Spezial Agent is examining all classes of entries under the Federal Land Laws. On examining the Gilbert claim I found a small pile of rocks; looked as if there had been a camp fire, that was all. My judgment, in looking at it was that it might have been used for a camp fire. There was absolutely no evidence that it was used as a foundation for a house.

CROSS-EXAMINATION BY MR. WALSH,
COUNSEL FOR DEFENDANT.

I lived in North Dakota since 1878; on the Little Missouri River and on the Big Missouri River. Mr. Kinsey pointed out this land to me. He was instrumental in bringing this case to the attention of the Department. I met him when I went there to examine the land. I had made arrangements to meet him, and I stopped at his place while I was out there. I could not say how long I spent on the Gilbert place. At that time probably twenty-minutes, or such a matter, but that was not the only time I have been over the land. I have been over the land several times subsequent to that. This time I was only there twenty minutes. All I had to do was go and look at the cabin, and identify the land, and go on. Either Kinsey or his son Frank was with me. I cannot say that I had their team then. I was over these lands a number of different times; sometimes I would use Mr. Kinsey's team, and sometimes I would use a Cascade team. I am not sure at this time whether I had his team or not, I might have had.

I examined the Gilbert claim on the 25th day of September; that is what my record shows. I did not find anything on the land in the way of improvements; didn't find any land under cultivation, or any fence, or any corral or other out houses of any kind. I found where a house had been; that is, what Mr. Gilbert told me; he told me that he had

lived there. That was in 1906 that I made the examination. I have absolutely no knowledge as to the conditions that existed prior to that time, and have no knowledge of the conditions that existed prior to September, 1906.

RE-DIRECT EXAMINATION BY MR.
SKINNER.

I did not find any indications of a barn, corral, or chicken-house there on the Gilbert entry.

WILLIAM L. KINSEY, being duly sworn, testified as follows:

“My name is William L. Kinsey, fifty-three years old, my occupation is farmer. I live in Cascade County, Township 19 No., Range 3 West; have lived there since April, 1904. I have known Mr. Cooper for nearly twenty-four years. He was in the sheep business. The Charles Gilbert claim is located in Sections Fourteen and Fifteen, same township and range. I am acquainted with that claim; have known it since the spring of 1904. I never saw any improvements there. There never was a cabin on that claim during the time that I knew it. I was present when Mr. Foley made the first examination out there on the Gilbert claim. I was not present when Mr. Gilbert pointed out where the cabin had been. Mr. Foley told me where it was. There is a few rocks there, and the ground looks as though there had been a ditch made around ten or twenty feet square, something like that, just a small trench. It could have been a house ditch or

a tent ditch. There is often a ditch around a tent you know. I never saw a cabin at that particular place at any time; I never saw any fencing there; never saw any chicken house or any improvements. I talked with Mr. Gilbert a little about it. I don't know as I ever saw Mr. Cooper there more than once before that time. Mr. Gilbert was working for Mr. Cooper in 1904. I think he was herding part of the time, and he might have been tending camp part of the time, I am not sure as to that; herding sheep. Mr. Gilbert is now somewhere in California, I am told. He sold his land.

CROSS EXAMINATION BY MR. WALSH:

I know nothing at all about the condition that existed in that country prior to April, February, or March, 1904. That it the first time I went into that locality. I lived about five and a half miles southwest from Cascade. I was first on the Gilbert claim in 1904. I was looking for some stock that had been turned loose. Never saw any improvements on the place. There was no house on the upper side, but I think there was one on what is known as the Weise claim. I know where the corner stone is. I was with Mr. Foley when he paced that off, and according to his measurement it was on the west claim. He did the measuring; I did not count his steps. I only know what he told me. I saw Mr. Gilbert working for Mr. Cooper, in 1904, herding sheep; I suppose they were Mr. Cooper's sheep; he was camped right there around Mr. Cooper's.

Saw him at the shearing shed. He was camped a portion of the time at what is known as Mr. Cooper's Crown Butte Ranch, possibly a mile or so from this land.

Thereupon, MR. EDWIN R. JONES, being duly sworn, testified as follows:

"My name is Edwin R. Jones. I am twenty-four years old, my residence is St. Peter, Montana; and my occupation, stockraising. I have lived there since July, 1904. Prior to that time I lived at Great Falls, Montana. I am familiar with the homestead entry of Charles Gilbert; have known it since August, 1904. There was nothing there that I could ever see in the way of improvements; I know of nothing whatever. I was present with Special Agent Foley at the time he interviewed Mr. Gilbert. The conversation took place in Mr. Cooper's Crown Butte Ranch house. There was no one present besides Mr. Foley, Mr. Gilbert and myself. Mr. Gilbert did not show Mr. Foley and me over his claim. He pointed it out to us, from the Crown Butte Ranch. I was there with Mr. Foley when Mr. Gilbert pointed out the ranch, and went with Mr. Foley to the claim and where the cabin had been. I found the place where Mr. Gilbert claimed he had a cabin. There were a few marks there that would indicate that something might have stood there at one time, and might have been a tent for all I know; it looked as if it was a trench made for either a tent or a small cabin, or something like that. There was nothing in the way of refuse or coal in the trench:

possibly a dozen rocks. If there was any indication of a chicken-house or a corral having been there, I couldn't see it. There was none of the land fenced when I first saw it. I knew Mr. Gilbert; he was working for Mr. Cooper when I first knew him. He was herding sheep. I do not know how long he worked; only what he told me. .

CROSS-EXAMINATION BY MR. WALSH:

I knew nothing about this claim prior to July, 1904. Never saw it before that date; knew nothing about Gilbert prior to that. When I say he was working for Cooper, I mean after that date. The first time I saw the Gilbert homestead was in August, 1904. I was riding after my cattle, and at that time I did not look around to see where the lines and corners were. I knew it was Gilbert's claim at that time. It was a very pretty location along the creek, and I always took notice of any place like that, more than I would ordinary range land. I saw it several times prior to going there with Mr. Foley. Mr. Gilbert pointed it out to Mr. Foley. At the time he pointed it out he was about a mile from the claim. There was no fence on the claim. I know where the south line of the claim is. I went to the corners to ascertain where the lines were. I was with Special Agent Foley at the time. The fence between the Gilbert and the Carnell land had been removed. The fence, I believe was removed in the Spring of 1905. There was a fence there in 1904 when I was there. It did not extend

around the Gilbert land. I didn't see a chicken-house or a corral, or any indications of a house. I do not know whether that fence belonged to Gilbert or Carnell. It is not customary to build cellars or foundations under cabins on claims, but several claims out there have foundations.

MR. FRANK J. KINSEY, being duly sworn, testified, as follows:

“My name is Frank J. Kinsey; age is twenty-seven; ranching is my occupation; Post Office address, at Simms, Montana. I am the son of William L. Kinsey who just testified. I have lived in Montana about twenty-four years, around St. Peters and Cascade. I have a claim of my own in section twenty-one. Moved there in 1904, sometime in April. I knew that section of the country two years before that, in 1902. I was riding after some horses. I am acquainted with the Gilbert claim ever since 1902. There was nothing on it when I first saw it in the way of improvements, by that I mean fencing, plowing or anything of that sort. In 1904 the same conditions existed. In the spring of 1904, Mr. Gilbert was at Mr. Cooper's Crown Butte Ranch, where I first met him. I should judge that is about a mile, possibly a mile and a half from his claim. He was herding sheep at that time, and I did not see any one else with him.

Q. Whether or not it is customary for a man to leave his sheep and go to some other place to live and sleep?

BY MR. WALSH: We object to that as incom-

petent, irrelevant, and immaterial; no custom is pleaded.

(Objection over-ruled, to which defendant excepted.)

A. No, sir, it is not. A great many times they don't use any corral.

There is a corral and shed at the Crown Butte Ranch. They use that for spring and winter mostly. I couldn't say that I saw Mr. Cooper particularly around the Gilbert land.

CROSS EXAMINATION BY MR. WALSH:

I first saw the Gilbert claim in 1902. I did not see any signs of improvement on it. I first knew Gilbert some time during the spring of 1904. I couldn't say just exactly what time it was, sometime in April, I should judge, or May, possibly the first of June, somewheres along there. He was herding sheep for Cooper at the Crown Butte Ranch. I saw him out with his sheep; that is about all I know about it. From the time I went out there in April 1904, he (Cooper) was up in that part of the country a good many times; I know one time, I was building a fence on my father's homestead, between there and the Carnell Claim, he came along and was talking about putting in some of the fence around the Carnell claim; he said it was his. He was on the Carnell claim at that time. I mean I saw him in that part of the country right around close. I saw him crossing the Gilbert claim. He had a road across that. He had a road he made himself, or his

men did, made the road there and used it in lambing; a road that was worked; around a side hill and crossing a creek.

JOHN LAVERGURE, being duly sworn, testified as follows:

“My name is John Lavergure. I am twenty-seven years old and live at St. Peters, Montana. Have lived there about nineteen years. Am a ranch hand. I knew Mr. Cooper in 1904 or 1905. I knew Mr. Gilbert; knew him before I went to work for Mr. Cooper, in the year 1903 or 1904. I was working for Mr. Cooper; do not know whether Gilbert was working for him or not. I do not know the Gilbert claim.

THOMAS J. SHORT, being duly sworn, testified as follows:

“My name is Thomas J. Short. I am fifty-three years old, live in Great Falls and am tending bar there. I moved there in 1891. I am acquainted with Mr. Cooper; have known him for about eight or nine years. I filed on a claim in Township 19.

Q: How did you come to file on that claim, Mr. Short? Just tell the circumstances surrounding it, reason for it?

BY MR. WALSH: We object to that as incompetent, irrelevant and immaterial, not a matter involved or any issue in this case, don't tend to prove any of the issues in this case.

(Objection over-ruled to which defendant excepted.)

A. Mr. Cooper asked me if I had my right to file

on land; I told him I did, and I filed on it that way.

I guess there was something said about how much I was to receive for using my filing right for Mr. Cooper; I have forgotten; a hundred dollars, or something; I have forgotten now; but I think it was in that neighborhood. After the conversation with Mr. Cooper, a certain attorney came up and we went up to the Court house and filed on the land. Mr. Cooper paid the filing fee. He did the same thing with reference to my daughter. I do not know where the land was located. The description of the land I filed on was furnished by Mr. Cooper. I never was to the land. I never got the chance to go to the land.

CROSS EXAMINATION BY MR. WALSH:

I had the conversation with Cooper at the Grand Hotel. I think Mr. Cooper was to give me One Hundred Dollars. Mr. Cooper made the same arrangements with both of us. My daughter wasn't there at the time, but she went to the Court house with us. I just told her what Mr. Cooper told me, and that's all that was said. I did not get anything out of it. I was supposed to when I proved up in fourteen months. I never proved up on the land. I signed the usual form of affidavit for homestead entry. I don't know what I signed exactly; my daughter signed the same. I do not know why we didn't make final proof.

RE-DIRECT EXAMINATION.

I don't remember whether I signed the papers that Mr. Cooper and his attorney presented to me, or if I had papers made out. I had no interest in my daughter's claim.

JOHN GARDIPEE, SR., being duly sworn, testified as follows:

"My name is John Gardipee, Sr. I live at St. Peter's Montana; lived there seven years. I know Mr. Cooper; have known him ten years. I know where the Gilbert claim is located. I have been through it ever since 1902. I didn't know at that time who it belonged to,—until later. I couldn't describe any improvements on it in 1902, 1903, and 1904. Never was any there that I know of; never saw any fence; wagon road crosses the claim. I could not say where the lines are.

CROSS EXAMINATION BY MR. WALSH:

I don't know who the Gilbert claim, so-called, belongs to. I do not know where the lines are. I don't know whether the Gilbert land was enclosed by a fence; I didn't see any fence around it.

JOHN B. GARDIPEE, being duly sworn, testified as follows:

"My name is John B. Gardipee; I am twenty-seven years old; reside at St. Peters, Montana; have lived there since 1903; When I first went there I wasn't home all the time; I was single at the time and worked out all the time, pretty near; but the last

couple of years I have been home all the time. In the spring of 1903 I was out there off and on. I have heard of the Gilbert claim out there, and know just about where it is. Knew Gilbert about ten years ago. He was working for Mr. Cooper; was working for him in 1902, and 1903 or 1904; If I remember right, he was there in 1902 and 1903. I did a little work for Mr. Cooper in 1905. I saw Mr. Cooper driving around that section of the country in the years 1902, 1903 and 1904. I did not see any improvements on the Gilbert claim in 1904. I have been over the claim. I have never seen a fence, chicken-house or corral on the claim.

CROSS EXAMINATION BY MR. WALSH:

I don't know what section the Gilbert place is in. I now know where the lines are. I did not know at the previous time. I don't know how long Gilbert worked for Mr. Cooper.

WILLIAM BELGARDE, being duly sworn, testified as follows being interrogated by MR. SKINNER:

"My name is William Belgarde. I am twenty-six years old, live at St. Peter's Mission, and have lived there all my life. I know Mr. Cooper; have known him for eight or ten years. And I am acquainted with Mr. Gilbert. I took up a homestead there. I was out to Mr. Cooper's, and he asked me why I didn't take up a homestead, he showed me a piece of ground there, and I told him that I would take it up. I went to Great Falls to make out

the papers. Mr. Cooper went with me. I don't remember who made out the papers. I don't recollect whether I signed any papers or not. Nobody gave me a description of the land. Mr. Cooper just showed me the land when we got there, but that wasn't the land that I filed on. It was another piece of ground. I made just one filing. I was mistaken in the land. That was on this open piece of land and that is what I intended to file on. I didn't know it until I proved up. I guess Cooper gave the Receiver of the land office the money. I think he paid for making out the papers. I never paid out anything. Cooper gave me back the filing papers when I made the relinquishment. I made the relinquishment about three years ago.

CROSS EXAMINATION BY MR. WALSH:

I filed on a piece of land, and afterwards relinquished it. That is all there is about the homestead entry.

It was thereupon admitted that the notice of intention to make final proof was published in the usual form and for the usual period, and the affidavit of publication filed; that patent had been issued for the land in the usual form, on the date mentioned, and that the usual affidavit of homestead entry had been made, and that the land was thereafter purchased by and conveyed to the defendant Cooper.

Thereupon plaintiff introduced in evidence the testimony of Charles Gilbert, and his witnesses,

Charles Wise, and William Mahaffey, in making final proof; which testimony is as follows:

(TESTIMONY OF CHARLES WISE, FINAL
PROOF WITNESS):

Charles Wise, being called upon as witness in final proof, testified as follows:

Q. 1. What is your name, age and Post Office address?

A. Charles Wise, Age 29 years, P. O. Cascade, Montana.

Q. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

A. Yes, with both.

Q. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

A. No.

Q. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land?

A. Grazing.

Q. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

A. In March 1899 settled, built house and established residence.

Q. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

A. Claimant has, he is unmarried.

Q. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

He has not been absent.

Q. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

A. $11\frac{1}{2}$ acres in garden, balance in pasture, too rough to brake up.

Q. 9. What improvements are on the land, and what is their value?

A. House 16x20, chicken house, coral, $11\frac{1}{2}$ acres broke, all fenced, worth \$300.

Q. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes?)

A. No.

Q. 11. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

A. No.

Q. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

A. No. Claimant has acted in good faith.

(Signed by his mark, and duly sworn to before the Receiver of the United States Land Office at Great Falls, Montana.)

(TESTIMONY OF WILLIAM MAHAFFEY,
FINAL PROOF WITNESS:)

Q. 1. What is your name, age, and post office address?

A. William Mahaffey, age 49 years, P. O. Cascade, Montana.

Q. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

A. Yes, with both.

Q. 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

A. No.

Q. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

A. Grazing land only.

Q. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

A. In March 1899, settled, built house and established residence.

Q. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

A. Claimant has, he is unmarried.

Q. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent,

did claimant's family reside upon and cultivate the land during such absence?

A. He has not been absent.

Q. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

A. 11½ acres in garden, balance in grass for pasture.

Q. 9. What improvements are on the land, and what is their value?

A. House 16x20, chicken house, corral all fenced, worth \$300.

Q. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes).

A. No.

Q. 11. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

A. No.

Q. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

A. No. Claimant has acted in good faith.

(Signed, and duly sworn to before the Receiver of the United States Land office at Great Falls, Montana.)

TESTIMONY OF CLAIMANT, CHARLES
GILBERT:

Q. 1. What is your name, age, and post office address?

A. Charles Gilbert, age 62 years, P. O. Cascade, Montana.

Q. 2. Are you a Native Born citizen of the United States, and if so, in what State or Territory were you born?

A. Born in New York, U. S. A.

Q. 3. Are you the identical person who made homestead entry No. 9785, at the Helena Land Office on the 1st day of December, 1898, and what is the true description of the land now claimed by you?

A. I am, and claim N 2 NW 4, Sec. 14., E 2 NE 4 Sec. 15. T. 19 N. R. 3 West.

Q. 4. When was your house built on the land and when did you establish actual residence there? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

A. In March 1899, built house and established residence, House 14x20 feet, chicken house, stable, all fenced, 1½ acres broke, worth \$300.

Q. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

A. I am unmarried, and have lived on the land since entry or since March 1899.

Q. 6. For what period or periods have you been

absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

A. Have not been absent.

Q. 7. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

A. One and one half acres for garden, balance in pasture, too rough to break.

Q. 8. Is your present claim within the limits of an incorporated town or selected site of city or town, or used in any way for trade or business?

A. No.

Q. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

A. Grazing land only.

Q. 10. Are there any indications of coal, Salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes:)

A. No.

Q. 11. Have you ever made any other homestead entry? (If so describe the same)?

A. No.

Q. 12. Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom, and for what purpose?

A. No.

Q. 13. Have you any personal property of any kind elsewhere than on this claim? (If so, describe same, and state where the same is kept.)

A. No.

Q. 14. Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

A. None made.

(Signed, and duly sworn to before the Receiver of the United States Land Office at Great Falls, Montana.)

FINAL AFFIDAVIT OF CHARLES GILBERT:

I, Charles Gilbert, having made a Homestead entry of the N 2 NW 4 Sec. 14, E 2 NE 4 Section No. 15, in Township No. 19 N., of Range No. 3 West, subject to entry at Helena, Montana, under Section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of Section No. of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a Native born Citizen of the United States; that I have made actual settlement upon and cultivated and resided upon said land since the 1st day of March 1899 to the present time; that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole bona fide

owner as an actual settler; that I will bear true allegiance to the Government of the United States; and further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

(Signed, Charles Gilbert, and duly sworn to before the Register of the United States Land Office at Great Falls, Montana.)

RECEIVER'S FINAL RECEIPT, and NON-MINERAL AFFIDAVIT IN THE USUAL FORM ALSO INTRODUCED IN EVIDENCE.)

Thereupon Plaintiff rested.

DEFENDANT'S TESTIMONY:

FRANK D. COOPER, being duly sworn, and being examined by MR. WALSH, testified as follows:

"My name is Frank D. Cooper. I am the defendant in this suit. I have lived in Montana since the Fall of 1872. My business is stock business principally. I was in the legislature in territorial days, and I served on the Board of Commissioners two terms, for Cascade County. I know the land called the Gilbert land or homestead. I purchased that land from him, and paid him a money consideration for it. I purchased the land in good faith. At the time I purchased the land I did not have any knowledge that it was claimed that he had not complied with the law with reference to residence and improvements. I know Mr. Belgarde, and heard

his testimony with reference to his homestead entry. I had nothing to do with his making that entry, and it was not made under any arrangements with me. I know Thomas Short and heard his testimony. I did not make any arrangements with him for making his entry, and I did not make any arrangements with him with reference to a homestead for his daughter; I never saw his daughter that I remember of. I think he made inquiry of me about the land. Lots of people up there did that. I kept maps of that country and people often asked me about different pieces of land. Probably Belgarde did. I can't say positively. He may have asked me if there was any government land over there in that country. I don't remember any conversation that I had with him, but there has been a good many inquiries about government land, and there is at the present time about government land up there. I have sold the land which I purchased from Gilbert.

BY MR. SKINNER: I want to see the contract. I assume this land is described, Mr. Walsh, in this contract?

BY MR. WALSH: Yes. There is a long description, and I had to check it over to see that it was correctly described.

BY MR. SKINNER: If your Honor please, all this testimony with reference to the sale of lands is objected to on the ground that the agreement is dated, December 13, 1909; that the records of the clerk of the United States Circuit Court for the Dis-

trict of Montana show that the bill of complaint was filed in the Clerk's office on the 7th day of December, 1909; I think the contract should be introduced in evidence. It may be made a part of the record as an exhibit.

Contract offered and received in evidence is as follows:

AGREEMENT.

THIS AGREEMENT, made and entered into this 13th day of December, A. D., 1909, by and between Frank D. Cooper, and Alice G. Cooper, his wife, both of Cascade, County of Cascade, Montana, parties of the first part, and Geo Heaton of Perry, Dallas County, Iowa, party of the second part;

WITNESSETH:

That the parties of the first part have this day sold to the party of the second part, subject to the terms of this agreement, twenty-one thousand eight hundred and forty (21,840) acres of land, more or less according to the Government survey, situate in Cascade and Lewis and Clark Counties, Montana, and more particularly described in Exhibits, A, B, C, D, and E, hereto attached and made a part hereof.

The party of the second part agrees to pay for said lands at the rate of Five and 70/100 Dollars (\$5.70) per acre in the following manner, to-wit:

Twenty Thousand (\$20,000.00) Dollars on or before thirty days after receipt at the office of the

second part at 219 Gilfillan Block, St. Paul, Minnesota, of an abstract compiled by a reliable abstractor, showing a right to such title, to all the property herein sold except two thousand (2000) acres in the parties of the first part, as will enable the first parties to convey the said property according to this agreement, and the parties of the first part agree to obtain title to the said two thousand acres excepted and furnish perfect abstract with reasonable diligence;

Twenty-five Hundred Dollars (\$2,500.00) at the signing hereof, receipt whereof is hereby acknowledged. Said amount is to be paid by drawing on the second party through a bank designated by Frank D. Cooper, and this agreement to be mailed by said bank to the second party for his signature upon the return of such draft paid;

Ten Thousand Dollars (\$10,000.00) on July, 1, 1910.

Fifteen Thousand Dollars (\$15,000.00) on October 1, 1910.

It is agreed that the second party may have an extension of the time in which to make the last mentioned payment up to January 1, 1911, if he so desires, and in case of the exercise of this right of extension said payment shall draw interest at the rate of eight per cent per annum during such extension;

The balance shall be paid in five annual installments payable on October 1 of each year after October, 1910.

The deferred payments shall not draw interest till

after October 1, 1910, except during such extension of time of payment as hereinbefore mentioned.

From and after October 1, 1910, the deferred payments shall draw interest at the rate of six per cent per annum, subject to the exceptions hereinafter mentioned.

The second party may have an extension of not more than ninety days after the due date of each payment after October 1, 1910, in which to make said payment, and in case of the exercise of this right of extension, or any part thereof, the second party shall pay interest on such payment at the rate of eight per cent per annum during the period of such extension.

The first party is to remain in possession of said premises till August 1, 1910, at which time possession is to be surrendered to the second party or to his agents, provided the second party has fulfilled the portions of the contract to be performed by him prior to said date.

The second party is to have the right to enter upon said premises at any time hereafter for the purpose of surveying and carrying on such engineering work as he may desire.

The second party is to have the right to crop any portion of said premises during the year 1910, which has heretofore been cultivated.

The first party agrees to irrigate the wild and tame hay, if possible, during the year 1910, up to August 1 of said year.

Upon the fulfillment of the terms of this agree-

ment by the second party, the first party agrees to convey to the second party, all lands set out in Exhibit "A" hereto attached, and all lands set out in Exhibit "B" hereto attached to which said first party has obtained or can obtain, deed from the Northern Pacific Railway Company, and all lands set out in Exhibit "D" hereto attached, subject to the terms of this agreement.

All lands conveyed to the second party under this agreement shall be conveyed in fee simple by Warranty deed free from reservations and incumbrances.

The first parties warrant that the lands set out in Exhibit "B" hereto attached, are under contract between Frank D. Cooper and the Northern Pacific Railway Company bearing date January 18, 1909. The first parties agree to fulfill the obligations of Frank D. Cooper to the Northern Pacific Railway Company as set out in said contract dated January 18, 1909. The first parties agree to use their best efforts to obtain deeds from the Northern Pacific Railway Company to the property set out on Exhibit "B."

It is agreed that the first parties will convey to the second party, by similar warranty deed as hereinbefore mentioned, all property set out in Exhibit "B" to which they obtain deeds, or can obtain deeds, from the Northern Pacific Railway under said contract of January 18, 1909. It is agreed that should the first parties be unable to obtain deeds from the Northern Pacific Railway Company

to some of the property set out in Exhibit "B", after the fulfillment of the obligations of Frank D. Cooper under said contract of January 18, 1909, then and in that case said first parties are not required to convey to the second party such property set out in Exhibit "B" as they are unable to obtain deeds to from said Northern Pacific Railway Company, and the second party is not required to pay for such property not conveyed.

It is agreed that the first parties will not permit any of the wild or tame hay to be grazed upon between May 15 and up to August 1, 1910, and that the second party shall have such hay crop with the right to cut and put up the same when desired.

The first parties agree to use their best efforts to speedily obtain clear title to the property set out in Exhibit "D", and to convey the same to the second party under this agreement when title is obtained. If title cannot be obtained, then said first parties are not required to convey the same to the second party.

The first parties agree to deliver possession of said premises to the second party on August 1, 1910, in their present condition of repair, usual wear and tear and action of the elements excepted.

The first parties agree to assign to the second party, or persons designated by him, at the time of the delivery of possession of said premises, all State leases on the property set out in Exhibit "C" hereto attached.

The first party agrees to make all payments ac-

cruing on State leases on the property set out in Exhibit "C" prior to the delivery of possession of said premises.

The first parties agree to pay the taxes on the premises for the time they remain in possession of the same.

The first parties agree to pay the second party interest on all money paid prior to the delivery of possession of the premises at the rate of six per cent per annum, said interest to be deducted by the second party from the next payment due to the first parties from the second party after possession is delivered.

The first parties are to furnish the second party an abstract of title to all water rights conveyed under this agreement, which water rights are as per Exhibit "E" hereto attached. Said abstract of said water rights is to be furnished at the same time that the abstract to the other property is furnished, and shall show title to said water rights in the first parties as set out in Exhibit "E" hereto attached, and said first parties agree to convey said water rights when said land is conveyed.

It is agreed that time is the essence of this contract and that upon the failure of the second party to make any of the payments of principal or interest at the time and in the manner as herein set out, then and in that case the first parties at the option, may, upon sixty days' notice to the second party, declare this contract forfeited and they may return into possession of said premises, and that all pay-

ments made under this contract shall be forfeited to the parties of the first part, and this contract shall become void and of no effect.

All payments to be made under this contract are to be made to the Great Falls National Bank, Great Falls, Montana, to the credit of Frank D. Cooper, and payment by check shall constitute a payment provided the said check is honored in the usual course of business.

Interest which is to be paid under this contract is to be paid on each payment at the time that payment is made.

This agreement is made in triplicate and executed in duplicate, one original with Frank D. Cooper and Geo. Heaton, and one copy with John Marshall.

(Signed) FRANK D. COOPER.
ALICE G. COOPER.
GEO. HEATON.

Witness for their Signature:

JOHN MARSHALL,
Twodot, Mont.

Witness for first two signatures:

MELVIN ROWE.

Witness as to Geo. Heaton.

JAMES DENE GRE.

(Duly Acknowledged.)

Exhibit "A" mentioned contains a description, with other lands, of the N 2 NW 4 of Section 14, and the E 2 NE 4 of Section 15, Township 19 North, Range 3 West, being the lands involved in this action.

Exhibit "B" contains a list of the unpatented lands purchased from the Northern Pacific Railway Company.

Exhibit "C" contains a description of the lands leased from the State of Montana.

Exhibit "D" contains a description of other lands.

Exhibit "E" contains a description of water rights.

Witness continues:

Q. Who has got possession of these lands now?

A. Oh, it is Barth, and Ross and King.

BY MR. WALSH: I will ask leave to withdraw the Exhibit and make a copy of it.

BY THE MASTER: Very well, you may submit a copy.

Cooper: That was A. H. Barth, J. R. King and Thomas Ross.

CROSS EXAMINATION BY MR. SKINNER.

As near as I can remember, I moved into that township in 1876. I don't think that I took up a homestead at that time, think, it was a little later on. I don't know when I took it up, but it was two or three years later I should judge. I was born in April

1851. We have lived there continuously since the time we moved there in 1879, excepting that my family lived in Helena for a while, and we have lived in Great Falls for the purpose of sending the children to school; but my home has been there continuously. In the year 1899, I don't remember whether I was there or not. I was there probably from time to time, but whether or not it was continuously in that year I couldn't say. During that time I was engaged principally in the sheep business, and also cattle. And during that time I employed a great many shepherders and other men to look after my sheep, up to the year 1905. Mr. Gilbert worked for me, but I can't state exactly when. I didn't keep any books of my business, but I kept a time book. I know where the Charles Gilbert land is in a general way. I think I was over the land a long time before the final proof was made. I don't know whether I can see that land from the Crown Butte Ranch or not. I was up there but not very often. At that time I didn't live around in there. I was in business on Birch Creek, and I expect that along about that time I was down at Glasgow, and sometime along in there I was on the board of commissioners and building that court house there at Great Falls, and was away a good deal; during the years 1902 and 1903, Gilbert lambled a bunch of sheep along up there. There might have been sheep there, and they might have used the sheds and corrals. There was running water there. We frequently used any shed or corral we could around

there during storms. The sheep might have been there and I might have used his corrals; I couldn't say. I did not go around to look at the sheep, or over those lands very much. My foreman generally looked after supplying the camps and those bunches. I don't remember of being up there in 1902 and 1903 or 1904. I did not have any interest up there at that time. I have been through there and I know that it is a rough country. The Crown Butte Ranch is away east of it, towards Cascade. The cabin is only about a mile from the Gilbert land. It is up in the canyon there, in a rocky canyon. Of course that land is government land; it has never been filed on. I don't remember advancing any money to Gilbert to make commutation proof with. If they had any money coming I gave it to them. I never advanced any money to them. I have lent him money. I do not remember of having any talk with Gilbert at the time he made his filing, or of going with him to Great Falls. I don't remember having any talk with Gilbert about making an entry unless it was in a general way. He was an old soldier, and he thought he had some rights. He had a claim, and he wanted a little place down there where he could run his horses; he had some horses; he finally traded them off for cattle. I don't remember any conversation with Short. There was conversations about land in a general way all the time, but I don't remember any conversation about taking up any. He might have talked with me along that line. I might have asked him what kind of claim he was

looking for—something of that kind. I don't remember having papers made out for him. And I do not remember of being present at the land office with him when he signed the papers. I do not remember seeing his daughter at all, and I do not remember talking with Mr. Short about his daughter taking up some land. I do not remember paying for the making of the papers, and the filing fees for Mr. Short and his daughter. I never offered Short or any body else one hundred dollars or any other consideration in that way. I had no conversation with Mr. Short as he testified. He may have asked me a question about where was the land, the same as a great many others do. If I pointed it out I would have been on the land. That land there is some distance away, some four or five or six miles. I don't think he knows where the ground is today. He was just talking to be talking. I don't remember paying his filing fees. I know I didn't pay them. If he was working for me he might have got the money. If it was paid it was charged up to him. If he got the money he would have sense enough to know that it was charged up to him, but I don't know how he got the money. If he got any money from me it was charged up to him.

Barth, Ross and King are not the men who purchased the land from me. They have leased it at present from Heaton. This agreement conveys twenty-one thousand eight hundred and forty-eight acres of land, and that is all I own in that vicinity. I bought about fourteen thousand acres from the

Northern Pacific Railroad Company.

RE-DIRECT EXAMINATION BY MR. WALSH:

The home ranch is about seven or nine miles from the Gilbert land. I should judge it is about a mile or a mile and a half from the Crown Butte Ranch to the Gilbert land. I have been away a good deal during these years. I always had a foreman in charge.

RE-CROSS EXAMINATION BY MR.
SKINNER:

I know that I didn't pay the filing fees for Mr. Short or his daughter. Some one might have borrowed the money or something of that kind, but I never paid their filing fees. That is a long while ago to remember these conversations. I don't think I would give anybody money to file on a piece of land—a saloon keeper.

(And the foregoing is all the evidence that was introduced.)

And thereafter the court filed its opinion in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES, DISTRICT OF MONANA.

UNITED STATES OF AMERICA,

vs.

No. 948.

FRANK D. COOPER and GEO.
HEATON.

Herein, the Court finds that for the period of eighteen months immediately preceeding final proof, Gilbert, entryman of the land involved, had no house, fence nor other improvements upon said land, did not reside upon nor improve nor cultivate the same, nor any or either of them; that defendant Cooper knew the foregoing facts when he purchased said land from Gilbert, the said entryman; that said defendant did not pay a valuable consideration therefor. And therefrom the Court concludes that the final proof of said Gilbert upon said land was false and fraudulent, was believed and relied upon by complainant and induced issuance of the patent here involved; that defendant Cooper is not a bona fide purchaser of said land; that cancellation of said patent has become impracticable since suit brought; that complainant is entitled to the relief of damages against defendant Cooper in the value of the land, \$5.70 per acre, with legal interest from December 13, 1909, and all costs; that unless paid by defendant Cooper, defendant Heaton shall pay the amount thereof to complainant from the unpaid purchase money owing by defendant Heaton to defendant Cooper upon his contract of purchase of said lands

when made a party hereto and appearing herein, such payment to discharge said purchase price to the extent thereof; that complainant have a lien therefor upon the land involved, and foreclosure thereof. And decree accordingly will be entered.

January 20, 1914.

BOURQUIN, J.

Now comes the defendant, Frank D. Cooper, and presents the foregoing as his Statement on Appeal, and moves that the same be approved by the Court.

JAMES A. WALSH,

Solicitor for the Defendant,

Frank D. Cooper.

I, the undersigned, Judge of the above named Court, do hereby certify that the foregoing Statement of Record on Appeal is true, complete, and properly prepared, and the same is therefore hereby approved by the Court.

Dated this 15th day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,

Judge.

(Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.)

And thereafter, the defendant, Frank D. Cooper, served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

NOTICE OF LODGEMENT OF TRANSCRIPT
ON APPEAL.

No. 948.

To the above named complainant, and Mr. B. K. Wheeler, United States Attorney for the District of Montana, its solicitor, and Mr. S. C. Ford, Assistant United States Attorney, and to the defendant, George Heaton, and Messrs. Day and Mapes, his Solicitors:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE:

That the statement of record on Appeal of the Defendant, Frank D. Cooper, in the above entitled action has been lodged, and is now in the office of the clerk of the above named Court.

AND YOU WILL FURTHER TAKE NOTICE:
That at the United States Court Room in the City of Helena, Montana, on the Twenty-second day of June, Nineteen Hundred and Fourteen, at the opening of Court, on that day, or as soon thereafter as counsel can be heard, the undersigned will ask the Court to approve the said Statement on Appeal, so prepared and lodged with the Clerk as aforesaid.

Dated this 11th day of June, A. D., Nineteen Hundred and Fourteen.

JAMES A. WALSH,
Solicitor for the Defendant,
Frank D. Cooper.

Service of the foregoing notice accepted and copy thereof received this eleventh day of June, 1914.

B. K. WHEELER,

United States Attorney for the District of
Montana and Solicitor for the complain-
ant.

DAY & MAPES,

Solicitors for Defendant George Heaton.

And thereafter the defendant, Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

NOTICE OF SUMMONS AND SEVERANCE.

TO THE ABOVE NAMED DEFENDANT,
GEORGE HEATON, and MESSRS. DAY
AND MAPES, his Solicitors:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE:

That the defendant, FRANK D. COOPER, in the above entitled action, intends to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and decree made, given and entered by the above named court in the above entitled cause, and filed on the 28th day of January, Nineteen Hundred and Fourteen, and the said defendant, Frank D. Cooper, hereby requests that you join with him in the said appeal, and upon your failure to so join with him in said appeal, that he will prosecute the said appeal alone.

JAMES A. WALSH,
Solicitor for defendant,
Frank D. Cooper.

Service of the foregoing notice admitted and copy thereof received this twenty-fifth day of June, Nineteen Hundred and Fourteen, and the said George Heaton hereby refuses to join in said appeal.

DAY & MAPES,
Solicitors for the Defendant,
George Heaton.

Copy of the foregoing received, June 26th, 1914.

B. K. WHEELER,
U. S. Attorney.

Endorsed: Filed June 26, 1914. Geo. W. Sproule,
Clerk.

And thereafter the Defendant, Frank D. Cooper, served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

NOTICE.

To the above named defendant, George Heaton, and
Messrs. Day and Mapes, his Solicitors:

YOU, AND EACH OF YOU WILL PLEASE
TAKE NOTICE:

That at the court room in the City of Helena, Montana, on the Second day of July, Nineteen Hundred and Fourteen, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the undersigned will call up the motion hereto an-

nexed and herewith served upon you.

JAMES A WALSH,
Solicitor for the defendant,
Frank D. Cooper.

Service of the foregoing notice admitted and copy thereof, and copy of motion received this 26th day of June, A. D., Nineteen Hundred and Fourteen.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.

B. K. WHEELER,
United States Attorney for the
District of Montana.

Endorsed: Filed June 26th, 1914. Geo. W. Sproule, Clerk.

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

MOTION.

Now comes the defendant, Frank D. Cooper, and moves the court for an order permitting him to prosecute alone an appeal from the judgment and decree made, given and entered in the above entitled action, and filed on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen, for the reason that his co-defendant, George Heaton, refuses to join in the appeal.

JAMES A. WALSH,
Solicitor for the Defendant,
Frank D. Cooper.

Endorsed: Filed June 26, 1914. Geo. W. Sproule, Clerk.

And thereafter the Court made and entered the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

ORDER OF SEVERANCE.

A judgment having been on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen, duly made, given and entered in the above entitled cause against the above named defendants, and the defendant, Frank D. Cooper, having on the 25th day of June, A. D., Nineteen Hundred and Fourteen, served on his co-defendant, George Heaton, a summons, and a notice of his intention to appeal from the said judgment, and requesting the said George Heaton to join with him in said appeal, and notifying him that upon his failure to so join, that he, the said defendant Frank D. Cooper, would prosecute the said appeal alone; and the said defendant, George Heaton, having in writing declined to join in the said appeal, and the said defendant, Frank D. Cooper, having on the 26th day of June, A. D., Nineteen Hundred and Fourteen served upon his co-defendant, George Heaton, notice of motion of severance and that he, the said Frank D. Cooper be allowed to prosecute the said appeal alone, and which notice and motion was likewise, on said date, served upon the complainant; and the said motion coming on for hearing the

Second day of July, Nineteen Hundred and Fourteen, and the court having duly considered the same;

IT IS THEREFORE ORDERED: That the interest of the said defendant, Frank D. Cooper, be, and the same is hereby severed from the defendant, George Heaton, and the said defendant, Frank D. Cooper be allowed to prosecute the said appeal alone.

IT IS FURTHER ORDERED: That this order and the motion and notices above mentioned be made a part of the record on appeal.

Dated this Second day of July, A. D., Nineteen Hundred and Fourteen.

GEORGE M. BOURQUIN,
JUDGE of the above named Court.

Due service of the foregoing is hereby admitted this Second day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.

Endorsed: Filed July 2, 1914. Geo. W. Sproule,
Clerk.

And thereafter the defendant Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

PETITION FOR APPEAL:

To the Honorable, the Judge of the above named Court:

The above named defendant, Frank D. Cooper, conceiving himself to be aggrieved by the decree entered herein on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen, in the above entitled proceeding, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that an appeal be allowed and that a citation issue as provided by law, and that a transcript of the record and proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper order fixing the security to be required of him to perfect his said appeal be made.

JAMES A. WALSH,
Solicitor for Defendant,
Frank D. Cooper.

Due service of the foregoing is hereby admitted this Second day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,

Solicitors for the Defendant,

George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule,
Clerk.

And at the same time the defendant Frank D. Cooper served and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

ASSIGNMENT OF ERRORS.

The defendant, Frank D. Cooper, in the above entitled action, in connection with his appeal, hereby makes the following assignment of errors, which he avers occurred in this cause, to-wit:

I.

It was error for the court to hold and find that Charles Gilbert, entryman of the land involved, did not build any house upon said land, and did not reside thereon, and did not fence the same, nor any or either of them prior to his final proof.

II.

It was error for the Court to hold and find that his, Gilbert's, improvements did not exceed One Hundred Dollars in value, and that the defendant Cooper knew the said facts, or any of said facts when he purchased the said land from Gilbert, or at any other time.

III.

It was error for the court to hold and find that the defendant Cooper knew of the facts or any of

the facts set forth in specific paragraphs Numbered One and Two, when he purchased the said land from Gilbert, or at any other time.

IV.

It was error for the court to hold and find that the defendant, Frank D. Cooper did not pay a valuable consideration for the land embraced in the Gilbert entry.

V.

It was error for the court to conclude, hold and find that the final proof of the entryman, Gilbert, was false and fraudulent, or that the complainant was induced to issue the patent herein involved by relying on any false or fraudulent statements.

VI.

I was error for the court to conclude, hold and find that the defendant Frank D. Cooper is not or was not a bona fide purchaser of said land.

VII.

It was error for the court to conclude, hold and find that the complainant is entitled to the relief of damages against the defendant Frank D. Cooper in the alleged value of the land, Five and 70/100 (\$5.70) Dollars per acre, as stated by the court, with legal interest from December 13th, Nineteen Hundred and Nine, amounting in all to Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars, and all costs.

VIII.

It was error for the court to conclude, hold and

find that the value of the land was or is Five and 70/100 (\$5.70) Dollars per acre, no evidence having been introduced as to value.

IX.

It was error for the court to conclude, hold and find that unless the said sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars was paid by the defendant Frank D. Cooper, that the defendant George Heaton shall pay the amount thereof to complainant from the unpaid purchase money owing by the defendant Heaton to the defendant Frank D. Cooper upon his contract of purchase of said lands when made a party hereto and appearing herein.

IX.

It was error for the court to conclude, hold and find that such payment, when made by the said Heaton, should be a discharge of said purchase price to the extent thereof.

X.

It was error for the court to conclude, hold and find that the complainant has a lien for the said sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars upon the land involved, and was entitled to the foreclosure thereof.

XI.

It was error for the court to conclude, hold and find that the complainant was entitled to a decree according to the findings and conclusions of the Court.

XII.

It was error for the court to order, adjudge and decree that the complainant have and recover from the defendant Frank D. Cooper the sum of Nine Hundred and Twelve (\$912.00) Dollars, with interest from the 13th day of December, A. D., Nineteen Hundred and Nine, (1909), amounting in all to the sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars, together with the costs and taxes, for that, no issue was raised in the pleadings, and no evidence was introduced concerning the value of the land.

XIII.

It was error for the court to order, adjudge and decree that unless the said amount, Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars, and costs, be paid by the defendant, Frank D. Cooper, that the defendant, George Heaton, pay the same to the complainant from the unpaid purchase money claimed to be owing by the said George Heaton to the defendant Frank D. Cooper upon his contract for the purchase of the lands.

XIV.

It was error for the court to order, adjudge and decree that upon such payment being made by the said defendant George Heaton it shall discharge the purchase price to the extent thereof.

XV.

It was error for the court to order, adjudge and

decree that the complainant have a lien upon the lands and premises mentioned in the complaint, for the sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars, and the costs, and that it is entitled to the foreclosure thereof.

WHEREFORE: The said defendant, Frank D. Cooper, prays that the said judgment of the said District Court of the United States, for the District of Montana, rendered in the said suit be reversed.

JAMES A. WALSH,
Solicitor of the Defendant,
Frank D. Cooper.

Due service of the foregoing assignment of errors is hereby admitted this 15th day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the Defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule,
Clerk.

And thereupon the court made and entered the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

ORDER ALLOWING APPEAL.

On this day came the defendant, Frank D. Cooper and presented his petition for appeal, and his assignments of error accompanying the same, which petition, upon consideration thereof, was allowed, and the court allowed the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon filing a bond in the sum of Fifteen Hundred Dollars, with good and sufficient security to be approved by the Court.

And it further appearing that the defendant, George Heaton was notified in writing to join in the said appeal, or to decline to join in such appeal; and it further appearing that the said George Heaton has declined to join in the said appeal, and has severed himself from the defense of this cause, the said defendant Frank D. Cooper is hereby granted his appeal as aforesaid, and his interest is severed in said appeal from the other defendant, George Heaton, herein.

Dated this 15th day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,
JUDGE of the above named Court.

Due service of the foregoing is hereby admitted this 15 day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule,
Clerk.

And thereupon, the defendant, Frank D. Cooper,
executed and filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That I, FRANK D. COOPER, as principal, and
J. L. TRUSCOTT and E. D. COLEMAN of Glas-
gow, Montana, as sureties, are held and firmly bound
unto the United States of America, in the sum of
Fifteen Hundred (\$1500.00) Dollars, lawful money
of the United States of America, for the payment of
which, well and truly to be made, we do hereby bind
ourselves, jointly and severally, and each of our
heirs, executors, administrators, successors and as-
signs, firmly by these presents.

Sealed with our seals, and dated this 6 day of
July, A. D., Nineteen Hundred and Fourteen.

WHEREAS, the above named defendant,
FRANK D. COOPER, has prosecuted an appeal to
the United Circuit Court of Appeals for the Ninth

Circuit, to reverse the decree rendered in the above entitled cause in the United States District Court for the District of Montana, made and entered on the Twenty-eighth day of January, A. D., Nineteen Hundred and Fourteen.

NOW, THEREFORE, the condition of this obligation is such that if the above named defendant Frank D. Cooper, shall prosecute the said appeal to effect and shall answer all damages and costs that may be awarded against him if he fails to make good his appeal then the above obligation is to be void; otherwise to remain in full force and virtue.

It is expressly agreed by the said J. L. Truscott and E. D. Coleman, the sureties above named, that in case of a breach of any condition of this bond, the court may, upon notice of not less than ten days, to the said J. L. Truscott and E. D. Coleman, proceed summarily in this action to ascertain the amount which such sureties are bound to pay on account of such breach, and render judgment against them for said amount and award execution therefor.

IN TESTIMONY WHEREOF: We have hereunto set our hands and seals this 6th day of July, 1914.

| | |
|------------------|--------|
| FRANK D. COOPER. | (SEAL) |
| J. L. TRUSCOTT. | (SEAL) |
| E. D. COLEMAN. | (SEAL) |

STATE OF MONTANA,
COUNTY OF VALLEY,—ss.

J. L. TRUSCOTT and E. D. COLEMAN, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, and not for the other says: That he is a resident and freeholder or householder in the said County of Valley, State of Montana, and that he is worth the sum in the said undertaking, specified over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

J. L. TRUSCOTT. (SEAL)

E. D. COLEMAN. (SEAL)

Subscribed and sworn to before me this 6th day of July, A. D., Nineteen Hundred and Fourteen.

C. D. ARNOLT,

Notary Public in and for the State of Montana; residing at Glasgow, Montana.

(SEAL.)

My Commission expires Jan. 26, 1915.

The foregoing bond is hereby approved this 15th day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,

JUDGE of the above Named Court.

Endorsed: Filed July 15, 1914. Geo. W. Sproule, Clerk.

And thereupon the court approved said bond, and issued the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

CITATION.

UNITED STATES OF AMERICA:

TO THE UNITED STATES OF AMERICA, Complainant and Appellee, and to B. K. WHEELER, United States Attorney, Solicitor for Appellee, and to GEORGE HEATON, defendant, and MESSRS. DAY & MAPES, his Solicitors, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein Frank D. Cooper is the appellant, and the United States of America and George Heaton are the Appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and reversed, and speedy justice should not be done to the parties on their behalf.

WITNESS, the Honorable George M. Bourquin, Judge of the United States District Court, for the District of Montana, this Fifteenth day of July, A. D., Nineteen Hundred and Fourteen.

GEO. M. BOURQUIN,

Judge of the District Court for the
District of Montana.

Due and personal service of the above citation is hereby admitted, and copy received and acknowledged this Fifteenth day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney.
DAY & MAPES,
E. C. DAY & T. D. MAPES,
Solicitors for the Defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule,
Clerk.

And thereafter the defendant Frank D. Cooper filed the following:

(TITLE OF COURT, TITLE OF CAUSE.)

No. 948.

PRAECIPE.

TO THE HONORABLE B. K. WHEELER, UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT OF MONTANA, Solicitor for the complainant, and to MESSRS. DAY & MAPES, Solicitors for the Defendant, George Heaton:

THE UNDERSIGNED, Solicitor for the defendant and appellant, herein, Frank D. Cooper, hereby files and serves upon you his praecipe, in conformity with the rules of Court, hereby indicating the portions of the record to be incorporated into the transcript on appeal herein, and which said por-

tions of said record you are hereby notified the said defendant and appellant will incorporate and include in the record on appeal. Said portions are as follows, to-wit:

A.

Judgment Roll, consisting of:

1. Bill of Complaint.
2. The Clerk's note following the Bill of Complaint.
3. The Subpoena.
4. The answer of the defendant, Frank D. Cooper, to the Bill of Complaint.
5. The Replication.
6. Order allowing Amendments to the Bill of Complaint.
7. The Notice, and Amendments to the Bill of Complaint.
8. The order to serve on the defendant George Heaton by publication.
9. Return of the Marshall.
10. Separate Answer of the defendant, George Heaton.
11. Replication to the Answer of the defendant, George Heaton.
12. The Decree.
13. The Certificate of the Clerk.

B.

The evidence introduced as incorporated in the statement of record on appeal.

C.

A memorandum of the documents introduced in evidence.

D.

A memorandum of the opinion of the Court.

E.

Defendant's notice to settle Bill of Exceptions.

F.

Certificate of Judge.

G.

Notice of Defendant Cooper's intention to appeal, and request to the defendant George Heaton to join in the appeal.

H.

Acceptance of service of the notice, and refusal to join in the appeal.

I.

Motion of Severance.

J.

Notice of Motion of Severance.

K.

Order of Severance.

L.

Petition for Appeal.

M.

Assignment of Errors.

N.

Order Allowing Appeal.

O.

Citation.

P.

Bond on Appeal.

Q.

This Praecipe.

R.

Insert the title of the cause in full in the Bill of Complaint.

S.

Omit the title of the court and cause in all subsequent papers and pleadings, excepting the statement, "Title of Court, Title of Cause."

T.

Omit the endorsements, excepting to state, "Filed," giving the date and the name of the clerk.

U.

Insert the acknowledgments of service of papers complete.

JAMES A. WALSH,

Solicitor for the defendant,

Frank D. Cooper.

TO GEORGE W. SPROULE, Clerk of the above
named Court:

You will please prepare the record on Appeal in the foregoing entitled action, and incorporate there-

in the papers and records set forth in the foregoing Praeceptum.

JAMES A. WALSH,
Solicitor for the Defendant,
Frank D. Cooper.

Due service of the foregoing admitted this 15th day of July, A. D., Nineteen Hundred and Fourteen.

B. K. WHEELER,
United States Attorney for the
District of Montana.

DAY & MAPES,
Solicitors for the defendant,
George Heaton.

Endorsed: Filed July 15, 1914. Geo. W. Sproule,
Clerk.

(TITLE OF COURT, TITLE OF CAUSE.)
CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MONTANA.—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing volume, consisting of ¹⁰³~~107~~ pages, numbered consecutively from One to ¹⁰³~~107~~ inclusive, is a true and correct transcript of the pleadings, processes, final decrees, orders, testimony and all other proceedings had in said cause, and of the whole thereof as appears from the original files and records of said court in my custody as such clerk; and I further certify and return that I have annexed to said transcript, and included within said pages, the original citation issued in said cause; all the foregoing being included in the statement or final record herein as approved by the Judge of this court.

In Testimony Whereof: I have hereunto set my hand and affixed the seal of this Court, at Helena, Montana, this.....day of
....., A. D. Nineteen Hundred
and Fourteen.

.....
Clerk.

9

No. 2461.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK D. COOPER,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Complainant and Appellee.

GEORGE HEATON,

Defendant Not Joining in Appeal.

No. 948.

APPELLANT'S BRIEF.

JAMES A. WALSH,

Solicitor for Appellant,

Helena, Montana.

Filed

NAEGELE PRINTING CO., HELENA, MONT.

SEP 29 1914

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

No. 2461.

FRANK D. COOPER,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Complainant and Appellee.

GEORGE HEATON,

Defendant Not Joining in Appeal.

No. 948.

APPELLANT'S BRIEF.

This suit was prosecuted by the Complainant to cancel a patent for One hundred sixty acres of land, situated in the Helena, Montana, Land District. It is alleged that Charles Gilbert made a

homestead entry, making the affidavit and paying the fees required by law (Tr. 3-4). That it was incumbent upon said Gilbert to make an actual settlement, cultivate and reside upon said lands for a period of five years (Tr. 5). That the said Gilbert made final proof on the 15th day of June, 1904, corroborated by two witnesses, Charles Wise and William A. Mahaffey. That the said Gilbert and his witnesses swore that he had resided five years upon the land, and had placed improvements thereon of the value of Three hundred Dollars, (Tr. 6-7). That a final receipt was issued, and on the 31st day of December, 1904, a patent was issued for said lands (Tr. 8).

That the said affidavits were false and fraudulent. That the said Gilbert did not establish his residence upon said land or reside thereon or put the improvements on said land, set forth in his affidavit, and that said affidavits were false and untrue in every particular. (Tr. 9-10-11). That the officers of the land office believed said affidavits, and believed them to be true, and issued to said Gilbert a final certificate, and thereafter issued and delivered to him the patent.

That the said Gilbert conveyed the lands to the defendant Cooper and that said Cooper occupies said lands and claims ownership thereof. (Tr. 12-13). That said Cooper was not a purchaser in good faith or for a valid consideration, but purchased the same with complete knowledge of the fraud of the said Gilbert (Tr. 13-14). And

the Complainant prayed that the patent so issued be declared void and cancelled and the legal and equitable right of possession be restored to the complainant (Tr. 15-16).

The defendant Cooper answered denying all knowledge as to the fraud claimed to be perpetrated by Gilbert, admitting the conveyance to him and his possession; denied that it was not purchased in good faith, and averred that he purchased the lands in good faith, paid a valuable consideration therefor, and believed and now believes that the said Gilbert procured the title to said lands in good faith, and had in all things complied with the law, and without any notice or knowledge that said Gilbert had not complied with the law or that it was claimed that he had not so complied (Tr. 20-26).

The defendant further averred that prior to the commencement of the action he entered into a contract with George Heaton and sold the land to him in good faith and for a valuable consideration, and that Heaton purchased it without any notice of the claim of the complainant that said Gilbert had not in all things complied with the law (Tr. 25).

To this the complainant interposed a general replication (Tr. 26-27). Thereupon testimony was taken, and at the conclusion of the hearing the Court held that Heaton was a necessary party and directed that he be made a party defendant.

United States vs. Cooper, 196 Federal, 584.

Thereupon the Court made an order permitting

the name of Heaton to be added, and to amend the complaint by interlineation (Tr. 27-28). Thereupon the complainant served notice of amendment of the complaint (Tr. 28-30), and the complaint was thereupon amended by interlineation. Those parts interlined are underlined in the Transcript. Process was served on Heaton September, 1912 (Tr. 31-32). Thereupon the defendant Heaton filed an answer denying generally the allegations contained in the bill of complaint (Tr. 33-39). The defendant Heaton further averred that the matters and things set forth in the bill of complainant did not accrue within six years before the said bill was filed and subpoenas served upon him, Heaton, and thereby pleaded the statute of limitations (Tr. 38-39). To this answer the complainant filed a general replication (Tr. 40). Thereupon the case came on for further hearing and on the 15th day of January, 1914, the Court rendered its judgment wherein it was ordered and decreed that the defendant Cooper agreed to sell the said lands to said George Heaton and that more than six years elapsed from the date of the issuance of the patent to the service of the notice upon Heaton, and the cancellation of the patent thereby became impracticable.

It was further decreed that the value of the land was Five Dollars and seventy cents per acre, and the complainant was entitled to recover the value thereof, to-wit: Nine hundred Twelve Dollars, with interest at the rate of eight per cent. per annum from the 13th day of December, 1909, amount-

ing in all to \$1212.96, and the costs of the action.

It was further decreed that Cooper pay that amount and that if Cooper did not pay it that the defendant George Heaton pay it out of the purchase price, and such payment would be a discharge of the purchase price to the extent thereof (Tr. 41-43).

The defendant Cooper served notice upon his co-defendant, requesting him to join in an appeal from said judgment (Tr. 82). Heaton refused to join in the appeal (Tr. 83). Thereupon the defendant Cooper served notice of severance and thereafter an order of severance was duly made (Tr. 83-84-85-86). Thereupon appellant filed a petition for an appeal (Tr. 87) and had issued and served on all the parties a citation (Tr. 97).

ASSIGNMENT OF ERRORS.

The defendant, Frank D. Cooper, in the above entitled action, in connection with his appeal, hereby makes the following assignment of errors, which he avers occurred in this cause, to-wit:

I.

It was error for the court to hold and find that Charles Gilbert, entryman of the land involved, did not build any house upon said land, and did not reside thereon, and did not fence the same, nor any or either of them prior to his final proof.

II.

It was error for the Court to hold and find that his, Gilbert's, improvements did not exceed One Hundred Dollars in value, and that the defendant Cooper knew the said facts, or any of said facts when he purchased the said land from Gilbert, or at any other time.

III.

It was error for the Court to hold and find that the defendant Cooper knew of the facts or any of the facts set forth in specific paragraphs Numbered One and Two, when he purchased the said land from Gilbert, or at any other time.

IV.

It was error for the Court to hold and find that the defendant, Frank D. Cooper did not pay a valuable consideration for the land embraced in the Gilbert entry.

V.

It was error for the court to conclude, hold and find that the final proof of the entryman, Gilbert, was false and fraudulent, or that the complainant was induced to issue the patent herein involved by relying on any false or fraudulent statements.

VI.

It was error for the court to conclude, hold and find that the defendant Frank D. Cooper is not or was not a bona fide purchaser of said land.

VII.

It was error for the court to conclude, hold and find that the complainant is entitled to the relief of damages against the defendant Frank D. Cooper in the alleged value of the land, Five and $70/100$ (\$5.70) Dollars per acre, as stated by the court, with legal interest from December 13th, Nineteen Hundred and Nine, amounting in all to Twelve Hundred and Twelve and $96/100$ (\$1212.96) Dollars, and all costs.

VIII.

It was error for the court to conclude, hold and find that the value of the land was or is Five and $70/100$ (\$5.70) Dollars per acre, no evidence having been introduced as to value.

IX.

It was error for the court to conclude, hold and find that unless the said sum of Twelve Hundred and Twelve and $96/100$ (\$1212.96) Dollars was paid by the defendant Frank D. Cooper, that the defendant George Haeton shall pay the amount thereof to complainant from the unpaid purchase money owing by the defendant Heaton to the defendant Frank D. Cooper upon his contract of purchase of said lands when made a party hereto and appearing herein.

IX.

It was error for the court to conclude, hold and find that such payment, when made by the said Heaton, should be a discharge of said purchase price to the extent thereof.

X.

It was error for the court to conclude, hold and find that the complainant has a lien for the said sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars upon the land involved, and was entitled to the foreclosure thereof.

XI.

It was error for the court to conclude, hold and find that the complainant was entitled to a decree according to the findings and conclusions of the Court.

XII.

It was error for the court to order, adjudge and decree that the complainant have and recover from the defendant Frank D. Cooper the sum of Nine Hundred and Twelve (\$912.00 Dollars, with interest from the 13th day of December, A. D., Nineteen Hundred and Nine, (1909), amounting in all to the sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars, together with the costs and taxes, for that, no issue was raised in the pleadings, and no evidence was introduced concerning the value of the land.

XIII.

It was error for the court to order, adjudge and decree that unless the said amount, Twelve Hundred and Twelve and 96/100 (1212.96) Dollars, and costs, be paid by the defendant, Frank D. Cooper, that the defendant, George Heaton, pay the same to the complainant from the unpaid purchase money

claimed to be owing by the said George Heaton to the defendant Frank D. Cooper upon his contract for the purchase of the lands.

XIV.

It was error for the court to order, adjudge and decree that upon such payment being made by the said defendant George Heaton it shall discharge the purchase price to the extent thereof.

XV.

It was error for the court to order, adjudge and decree that the complainant have a lien upon the lands and premises mentioned in the complaint, for the sum of Twelve Hundred and Twelve and 96/100 (\$1212.96) Dollars, and the costs, and that it is entitled to the foreclosure thereof.

THE QUESTIONS PRESENTED UPON THIS APPEAL ARE:

(1.) Is the evidence sufficient to sustain the finding that the entryman Gilbert did not comply with the law and was guilty of fraud in making his homestead entry and procuring title thereto?

(2.) Is the evidence sufficient to sustain the finding that the defendant Cooper is not an innocent purchaser without notice and for value?

(3.) Is the decree within the issues and supported by the pleadings and evidence?

ARGUMENT.

The first, second, third and fifth assignments of error relate to alleged fraud of the entryman, Gilbert. In actions of this character, it is incumbent upon the plaintiff to produce evidence that is clear and convincing, and a mere preponderance of evidence should not suffice. The burden is upon the Complainant to prove the fraud alleged, and not upon the defendant to disprove it. The witness Foley knew nothing of the conditions of this claim prior to September 1906. The testimony of Mr. Kinsey does not disprove the testimony of Gilbert or his witnesses. The witness knew nothing about this claim prior to 1904. The testimony of the witness Frank J. Kinsey is not sufficient to overcome the testimony of the witnesses in final proof. The witness Lavergure knows nothing at all about the claim.

The witness Thomas J. Short did not testify anything about the claim, but only about some alleged conversations with Cooper which were wholly inadmissible. The two witnesses Gardipee, did not show sufficient knowledge to testify as to the conditions of the Gilbert claim or whether or not Gilbert resided there. The testimony of the witness Belgrade does not prove or disprove any issue in the case, and is wholly inadmissible for any purpose.

The Complainant introduced the evidence of the entryman and his witnesses in making final proof, and having introduced it, it is entitled

to some credence, and it is incumbent upon the plaintiff to overcome that evidence by proof that is clear and convincing. This, I submit, they have failed to do.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

“We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this

is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful.”

This language was quoted with approval in the case of *United States vs. Budd*, 144 U. S. 154.

Applying this test, the complainant's testimony falls far short of making out a clear and convincing case of fraud.

The evidence of the witness Short and Belgarde was not admissible for any purpose. It was introduced for the purpose of showing or attempting to show that other parties filed on lands at the instigation of Cooper. No proof of any contract between them and Cooper was attempted to be proven, and it was only left to inference that Cooper had a fraudulent intent. This evidence was inadmissible.

In the case of *United States vs. Budd*, 144 U. S. 154, the Court said:

“If its title was fairly acquired, it matters not what wrongs have been done by either defendant in acquiring other lands; so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the Government?”

and in that case the Court further said:

“Because a party has done wrong at one time and in one transaction, it does not necesasrily follow that he has done like wrong at other times and in other transactions.”

It is contended that the burden is on the defendant Cooper to prove that he was a bona fide purchaser, without notice and for a valuable consideration.

The complainant, appellee, failed to in any way connect the defendant, appellant, Cooper with the alleged fraud, or to bring home to him notice that the entryman had failed to comply with the law and had practiced a fraud upon the Government and failed to prove any facts that would lead to such knowledge on the part of the appellant, Cooper.

I respectfully submit that the evidence falls far short of being of that satisfactory and convincing character required in such cases, and further, that the defendant Cooper has established that he was a purchaser in good faith, without notice, and for value.

~~the claim of the complainant that the entryman had~~
not complied with the law. Cooper is a man of

is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful.”

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“If its title was fairly acquired, it matters not what wrongs have been done by either defendant in acquiring other lands; so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the Government?”

and in that case the Court further said:

“Because a party has done wrong at one time and in one transaction, it does not necesasrily follow that he has done like wrong at other times and in other transactions.”

It is contended that the burden is on the defendant Cooper to prove that he was a bona fide purchaser, without notice and for a valuable consideration.

It is only when the complinant has made out a case supported by strong, clear and convincing testimony that the burden is cast upon the defendant. Complainant has failed to make out such a case.

DEFENDANT COOPER IS AN INNOCENT PURCHASER.

The defendant Cooper pleaded that he was an innocent purchaser for value and without notice. He testified that he purchased the land and paid a valuable consideration for it. He knew nothing of the claim of the complinant that the entryman had not complied with the law. Cooper is a man of

large affairs, owned large quantities of land and did not critically examine every tract of land which he purchased, and he did not critically examine the land in question. Final proof had been made to the satisfaction of the Government officials, and he was entitled to rest upon the presumption that the entryman had complied with the law.

He purchased directly from the entryman after the entryman had made proof and his proof was passed upon and accepted by the Government officials.

There is a distinction between purchasing land direct from the entryman and from another. In case of a purchase from an entryman after the acceptance of his final proof, there is a presumption that he has complied with all the provisions of the law and has a good title.

In *United States vs. Stinson*, 197 U. S. 200, the Court said:

“While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of

the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof."

"Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' "

* * *

Further:

"But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value, without notice, is perfect."

These quotations are supported by numerous decisions of United States Supreme Court cited in the original opinion, which we think unnecessary to cite here.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

"The deliberate action of the tribunals to

which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument, and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided."

See also *Colorado Coal & Iron Company vs. United States*, 123 U. S. 307.

The complainant, appellee, failed to in any way connect the defendant, appellant, Cooper with the alleged fraud, or to bring home to him notice that the entryman had failed to comply with the law and had practised a fraud upon the Government and failed to prove any facts that would lead to such knowledge on the part of the appellant, Cooper.

I respectfully submit that the evidence falls far short of being of that satisfactory and convincing character required in such cases, and further, that the defendant Cooper has established that he was a purchaser in good faith, without notice, and for value.

THE DECREE IS NOT WITHIN THE ISSUES
AND IS NOT SUPPORTED BY PLEAD-
INGS OR EVIDENCE.

The character of the decree entered renders it unnecessary to discuss at length the question of the alleged fraud of the entryman or Cooper's alleged knowledge of the fraud or the consideration paid by him for the land. The decree is outside of any issue raised by the pleadings and outside of any evidence introduced at the trial.

The suit was brought for the express purpose of cancelling the patent. The bill of Complaint was framed for that and no other purpose. If the pleadings and evidence do not entitle complainant to a decree cancelling patent, complainant is not entitled to any other relief.

The defendant Cooper alleged in his answer that he had sold the land to George Heaton. The complainant took issue on that subject and filed a general replication.

After the testimony was taken the Court held that Heaton was a necessary party.^t

United States vs. Cooper, 196 Fed. 584.

The Court permitted the Complainant to amend its bill of complaint by interlineation, and an order was made to that effect (Tr. 26-27-28). The bill was amended accordingly (Tr. 28-29-30). The parts interlined are underscored in the bill of Complaint so that they may be identified by the Court.

More than six years elapsed from the date patent was issued and the order making Heaton a party and the service of process upon him. He pleaded the statute of limitations (Tr. 38-39).

The Court by its decree, adjudges and decreed that on account of the expiration of six years from the date of the issuance of the patent it could not be cancelled, and decreed that the value of the land was \$5.70 per acre or \$912., and decreed that the defendant Cooper pay that amount with interest, amounting in all to \$1212.96. And unless that amount was paid by Cooper that the defendant Heaton pay it out of the money due Cooper, and upon such payment would discharge Heaton to the extent of such payment from the money due Cooper under the Contract.

I respectfully submit that this decree is wholly outside of the issues raised by the pleadings and wholly outside of the evidence. There is not a single allegation in any of the pleadings or any allegation that in any way affects the value of this land, and no evidence of value was offered or admitted.

Heaton avers that he purchased this land and other lands from Cooper at \$5.70 per acre, but there is no allegation that that is the value of the land.

The contract between Cooper and Heaton shows that he purchased 21,840 acres at the rate of \$5.70 per acre. But the Court cannot presume that all that land was of equal value. Indeed, the Court should take judicial notice of the fact that in such a

large tract of land in this mountainous country with its mountains and valleys there is a great diversity in the character and value of the land. One tract may be smooth tillable land and the adjoining tract rough and stony. One tract may be valuable for agricultural purposes and the adjoining tract worthless for any purpose other than pasture, and of little value for that. But the subject was not an issue in the case. It was not raised by the pleadings. Under the pleadings no evidence could have been introduced as to value. None was introduced. If it was an issue in the pleadings, and evidence had been admissible to prove value, the value of this particular tract would have to be established, not the price at which over 21,000 acres was sold. The question of value not being an issue, the Court could not, under a prayer for general relief determine the value of the land and declare that Cooper shall pay the amount, and that if he does not pay that Heaton shall pay it and he shall thereupon be discharged for that amount due Cooper under the contract.

Heaton has sold the land. Can an execution issue against Heaton? Can an execution issue against Cooper? Can the government order a sale of the land and compel Cooper to pay any deficiency? To support a judgment of that kind there must be proper allegations. It is elementary that a decree must be supported by the pleadings and the evidence. The decree in this case is not supported by the pleadings and the evidence is wholly outside of both.

In *Windsor vs. McVeigh*, 93 U. S. 274, the Court said:

“Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.”

In *Washington, Alexandria & Georgetown Railroad Company vs. Mayor and Board of Aldermen of Washington*, 77 U. S. 299, 19 Lawyer's Edition, 894, the Court said:

“It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only which is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross-bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration.”

In *Crocket vs. Lee*, 7 Wheaton 523, Chief Justice Marshall said:

“The rule that the decree must conform to the allegations as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with it in this case.”

In *English vs. Foxall*, 2 Peters 595, the Court said:

“There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill; and there is nothing in the first bill to sustain the particular relief granted as to the deficiency.”

In *Hayward vs. Bank*, 96 U. S. 611, the Court said:

“But such liability is not charged, nor is such relief asked in the bill. The specific relief sought is a decree requiring the Bank to transfer the stock to him—a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience; but we incline to the opinion that its whole frame and structure are inconsistent with a right in this action to a decree for the value of the stock, even if the facts justified any such relief.”

And so in the case at bar. The Court acknowledged and decreed that it was beyond its power to do that which the Complainant demanded in its prayer for relief and as set forth in its pleadings, and such relief being beyond the power of the Court, it gave a judgment and decree and relief to the Complainant wholly outside of the issues and wholly unsupported by evidence.

In the case of *New Orleans vs. Citizens Bank*, 167 U. S. 371, the Court said:

“We are at a loss to understand by what process of reasoning the decree was made to cover the question of the nonliability of the bank for license. It was not presented by the

pleadings, and was entirely dehors the issues in the case.”

The same rule prevails in all courts.

In *Alywin vs. Morley*, 41 Mont. 191, 108 Pac. 778, the Supreme Court said:

“It will, however, be conceded that the judgment in her favor must rest upon some proper pleading, either her own or that of the plaintiff. A judgment without a pleading to support it cannot stand; and this is the reason why the question whether a complaint states facts sufficient to constitute a cause of action is never waived and can be raised in this court for the first time.”

The judgment entered in this case, being outside of and not supported by the pleadings or evidence must be reversed. The court, having adjudged and decreed that the patent cannot be cancelled, thereby affirmed the patent and the complainant not having appealed from that judgment, it became final. The complainant is not entitled to any relief whatever under the issues raised in the pleadings and the judgment should be reversed and the action dismissed.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

FRANK D. COOPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

GEORGE HEATON,

Defendant not joining in appeal.

APPELLEE'S BRIEF.

BURTON K. WHEELER,

United States Attorney,
District of Montana,

FRANK WOODY,

Assistant U. S. Attorney,
District of Montana,

Solicitors for Appellee.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

| | | |
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| FRANK D. COOPER, | <i>Appellant,</i> | } |
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| GEORGE HEATON, | | |
| <i>Defendant not joining in appeal.</i> | | |

APPELLEE'S BRIEF.

This case, as briefly stated in appellant's brief, in his statement of the case, is one that was brought for the cancellation of the patent to certain lands comprising the homestead entry of Charles Gilbert. The allegations of fraud and other matters set forth in the pleadings can only be fully understood by a reading thereof, so no attempt will be here made to elaborate on the statement of the case as appellant has stated it and we content ourselves with replying to the argument of counsel for appellant as set forth in his brief.

ARGUMENT.

We will take up the argument of appellant in the order he has followed and reply to the first two subjects argued by him under this heading.

Appellant makes the assertion that the evidence in this case is wholly insufficient on which to base the findings made by the lower court, and then follows such assertion with what he pretends is a statement of all the evidence taken in the matter. Of course, if the evidence shows only what he contends it does there might be some reason for his conclusions, as to its insufficiency, being regarded as proper, but we most respectfully submit that the evidence in this case is amply sufficient to sustain the findings of the court and the decree, as the barest inspection of it will show.

It is admitted that Charles Gibert filed upon the land in question as a homestead entry, made final proof thereon and received a patent therefor (Tr. pp. 20-26); it is likewise admitted that the appellant purchased said lands from Gilbert but denied that he knew anything of the facts as to whether or not Gilbert had practiced any fraud upon appellee in making his entry or final proof. This latter must be ascertained from the evidence and the following summary will show, beyond a doubt, that the allegations of the complaint are fully proven:

The witness Edgar S. Foley, a special agent of the General Land Office, testified: that on Sep-

tember 25, 1906, he first saw the land in question and examined it; that he found no buildings upon it nor any plowing or fencing and no evidence of a house foundation; he saw Charles Gilbert, the entryman, and Gilbert told him he had lived on it and where the house had been and that Cooper had moved the house to another claim; the witness further testified that he had had experience examining all classes of entries; that he found a small pile of rocks there that looked as though they had been used for a camp fire; there was absolutely no evidence that these rocks had been used as a foundation for a house; that the first time he had gone to the Gilbert entry he stayed about twenty minutes and had been there several times later; he didn't find any buildings of any kind or any land under cultivation on the claim; Mr. Gilbert told him where a house had been; he didn't find any indications of any buildings on the entry that was in 1906, (Tr. pp. 44-47).

The witness, William L. Kinsey, testified: that he was a farmer and had lived in township 19 N., R. 3 West since April 1904; that he had known Cooper for twenty four years; that the Gilbert entry was in the same township he lived in and he never saw any improvements there; there was no cabin on the claim since the spring of 1904, the time he first knew it; at the place where Gilbert pointed out to Foley as the site of the house, there were a few rocks and a ditch made around ten or twenty feet square—just a small ditch, it could have been

a house or tent ditch; he never saw a cabin at that particular place at any time; he never saw a chicken house, fencing or any improvements; he saw Cooper there at least once before that time; that Gilbert worked for Cooper in 1904; witness thought Gilbert was herding sheep or tending camp for Cooper, (Tr. pp. 47-48).

On cross-examination the witness testified: that the first time he went into the locality of the Gilbert claim was in February, March or April, 1904; he was first on the Gilbert claim looking for some stock; there was no house on the upper side nor any improvements on the place; he knew the corner stone of the section; the witness saw Gilbert herding sheep for Cooper in 1904; Gilbert was camped right around Mr. Cooper's, and witness saw Gilbert at the shearing shed; Gilbert was camped at the Cooper Crown Butte ranch about a mile or so from the Gilbert entry, (Tr. pp. 48-49).

The testimony of the witness, Edwin R. Jones, is entirely omitted from appellant's comment on the evidence, it is as follows: Witness testified that he had known the Gilbert land since August 1904; that he could never see anything on it in the way of improvements; I went with Special Agent Foley to look at the place Gilbert pointed out as the place where the cabin had stood and we found nothing there except a few marks that would indicate something might have stood there at one time; it looked as if it was a trench for either a tent or a small cabin; there was nothing in the way of refuse in

the trench, possibly a dozen rocks were in it; I didn't see any indication of a chicken house or a corral having been there; there was no fence extending around the Gilbert claim in 1904, (Tr. pp. 49-51).

Frank J. Kinsey, testified: that he was a son of William L. Kinsey and had lived around that locality about 24 years; witness had a claim in section 21; first knew Gilbert entry in 1902; there was nothing on it when he first saw it in the way of improvements—no plowing or fencing; in 1904 the same conditions existed; in the spring of 1904 Gilbert was herding sheep at Cooper's Crown Butte ranch about one and a half miles from Gilbert's entry; that it is not customary for a man to leave his sheep and go to some other place and live and sleep; that from the time witness went out there in April, 1904, Cooper was up in that part of the country a good many times; witness saw him crossing the Gilbert claim; Cooper had a road across the Gilbert claim, which he or his men had made, and Cooper used the road in lambing; the road was worked, went around a side hill and across a creek, (Tr. pp. 51-52).

John Gardipee, Sr., testified: that he had known Cooper for ten years and knew where the Gilbert claim was located; that he had been through the claim ever since 1902; the witness couldn't describe any improvements on the claim because there never was any there that he knew of—he never saw any fence; a wagon road crosses the claim; he

didn't see any fence around the claim; (Tr. p. 55).

John B. Gardipee, testified: that in the spring of 1903 he worked out there (near Gilbert's entry) off and on; he knew Gilbert about ten years ago (1900) Gilbert was working for Cooper in 1902 and 1903 or 1904; he saw Cooper driving around that section of the country in 1902, 1903 and 1904; he did not see any improvements on the Gilbert claim in 1904; he never saw a chicken house, fence or corral on the claim, (Tr. pp. 55-56).

Appellee, thereupon, introduced in evidence the testimony of Charles Wise and William Mahaffey, given upon the final proof hearing of Gilbert's homestead entry; these two witnesses upon said final proof both testified as follows: I am well acquainted with claimant (Gilbert) and the land embraced in his claim; it is grazing land; in March, 1899, claimant settled, built house and established residence upon the homestead; claimant has resided continuously on the homestead since first establishing residence; he is unmarried; claimant has not been absent from the land since making settlement; claimant has one and a half acres in garden, balance in pasture; the improvements on the land are a house 16 x 20, chicken house, corral, 1½ acres broke, all fenced, worth \$300.00; claimant has acted in good faith, (Tr. pp. 58-61).

Thereupon the testimony given by Charles Gilbert in making final proof was introduced by plaintiff; this showed that Charles Gilbert had testified as follows: My name is Charles Gilbert, I

am 62 years old, reside at Cascade, Montana; I am the identical person who made homestead entry for the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 14 and E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 15, Tp. 19 N., R. 3 W. in the Helena Land Office December 1, 1898; my house was build on the land in March, 1899, and I then established residence thereon; the house is 14 x 20 feet; other improvements are a chicken house, stable, all fenced, $11\frac{1}{2}$ acres broke, worth \$300.00; I am unmarried and have lived on the land since entry or since March, 1899; I have not been absent from the homestead since making settlement; I have cultivated one and a half acres each season for garden, balance in pasture, too rough to break; the land is grazing only; I have no personal property elsewhere than on this claim, (Tr. pp. 62-64).

Appellee then introduced in evidence the final affidavit of Charles Gilbert made in connection with his final proof, among other formal things it said: "I have made actual settlement upon and cultivated and resided upon said land since the 1st day of March, 1899 to the present time," (Tr. p. 64).

In addition to the foregoing the Appellant, himself, testified that he moved into the township where Gilbert's claim was in 1876 and two or three years later himself took up a homestead; that Gilbert had worked for him but he didn't remember when; during the years 1902 and 1903 Gilbert had lambd a bunch of sheep up there (at the claim) for him.

The rest of Cooper's testimony was nearly all what he did not remember; he kept no books to show when Gilbert worked for him, except a time book, which was never produced to contradict the testimony of the witnesses who have, as shown above, testified positively that Gilbert was working for him prior to making final proof on the claim.

Can it possibly be said that a man can live in a neighborhood from 1876 to 1910, and all but three years of said time have a homestead in the same township with the claim under consideration, own about 21,000 acres of land all around the claim, and yet know nothing about the homestead entry of a man who has resided on the entry for over five years continuously and had the claim fenced. Would it be possible for a road to be constructed across this claim by Cooper or Cooper's men and used by them and this claim exist, completely fenced as it was claimed in the final proof to be, all within the domain or empire of this sheepman and he never know anything about it?

The testimony of the witnesses Short and Belgarde (Tr. pp. 53-55; 56-57) was certainly admissible to show the usual methods employed by appellant in obtaining title to land from the United States. Short testified that he was to receive something like \$100. for using his filing right for Mr. Cooper, (Tr. p. 54); Short never saw the land, the description and papers were furnished by Cooper and Cooper paid the filing fee, (Tr. p. 54). Belgarde also filed on a piece of land at Cooper's sug-

gestion, and thinks Cooper must have paid for making out the papers and the filing fees, he, Belgarde, never did, (Tr. pp. 56-57).

In cases of this kind it is seldom, if ever, possible to secure direct proof of the fraudulent acts of a party, for from the very nature of things persons who are engaged in the business of acquiring land from the United States and building up a vast domain such as Cooper had, do not work openly. On the contrary such persons are careful that no written evidence of their scheme to obtain the land is available and no one except the entryman, who is duped into taking part in the plan for a few paltry dollars, is present. Indeed, it is remarkable that men, of apparently good standing in a community, will go into the business of acquiring lands as Cooper did in the present instance, and, when the United States objects to its land laws being abused, protest they have always been acting in good faith and are purchasers for a valuable consideration, when in truth and in fact they have watched their tools, men like Gilbert file upon claims and have seen the land laws more honored in their breach than observance. The most unobserving person, in Cooper's position, would have been compelled to notice that Gilbert's entry was a sham and a fraud and unless, like Cooper, were desirous of acquiring it would have denounced it for what it was—a palpable attempt to defraud the government.

In the case of *U. S. v. Stimson*, 197 U. S. 200-207, cited by appellant on page 14 of his brief, the

decision of the court was based upon the fact that forty years had elapsed since the commission of the alleged fraud and the institution of the suit and the purchaser from the patentees had held the lands and obtained large credits on the strength of being such owner, and the creditors were equitably entitled to protection. This together with the weakness of the evidence was the reason for said decision, but the poor quality of the evidence was not alone the basis of the decision.

In the case at bar we have no such considerations as there were in the Stinson case, *supra*; here Cooper had retained the lands but only a few years had elapsed and no rights of creditors are involved.

Appellant seems to argue that because he purchased this land from Gilbert without any knowledge that the United States claimed Gilbert had not complied with the law, that he is an innocent purchaser for value. But a man cannot sit idly by and live in the neighborhood of a piece of land from 1876 until 1904, the time when final proof was made and the land bought by him, and say that he was innocent of what Gilbert had done. A man cannot close his eyes, as Cooper desires this court to believe he did, and then profit by his endeavors to notice nothing. He must have known on July 15, 1904, when he purchased the land, that Gilbert had worked for him herding sheep for several years prior thereto, and knowing that Gilbert was so in his employ, he, an experienced sheepman, knew that Gilbert did not herd sheep at some remote portion

of Cooper's 21,000 acres and return to the claim every night, or even maintain a "continuous residence" for five years as the law required a homesteader to do. It was not incumbent upon the United States to notify Cooper, or anyone else, that it would insist on a cancellation of the patent within the statutory period, if it discovered that Gilbert had practiced a fraud in making his final proof. Indeed, Cooper was so anxious to secure this land that he could not wait until a patent had issued for it, but purchased it July 15, 1904, less than thirty days after final proof was made and five and a half months before patent issued. It is absurd to say that a man who owns a large tract of land, "a man of large affairs," is by reason of that fact not expected to know what is being done with a piece of land, over which he built a road and in whose service the entryman had been engaged for several years prior to the final proof and purchase.

We must respectfully submit that the evidence in this case shows most conclusively: that Gilbert never complied with the law so as to entitle him to a patent; that both Gilbert and his witnesses on the final proof hearing are shown to have been most reckless with the use of the truth; that the statements contained in the testimony given on the final proof hearing were absolutely false and were made for the sole purpose of deceiving the officials of the United States Land Office; that Cooper was aware of all that transpired in and about the homestead of Gilbert and particularly as to the improvements

never existing as the final proof said they did and that no residence was ever established or maintained as was claimed. Cooper does not deny that the testimony given at the final proof hearing was false but contents himself with asserting that he knew nothing about it. He bases his good faith upon what was contained in the final proof and its acceptance by the officials of the land office, but his knowledge of the country and the doings therein acquired by nearly thirty years residence and the fact that Gilbert had been in his employ for several years immediately prior to the making of the final proof must have advised him that a fraud was being perpetrated and he cannot claim he was without fault. The mere fact that the title he bought was nothing but one based on a final receipt issued less than thirty days before the purchase was a thing that should have put him upon inquiry and if he neglected to inquire into the bona fides of the entry his neglect is no protection to him. His "large affairs" and enormous land holdings alone show that he was a man well versed in the ways of the world and particularly with all the details of acquiring the public domain. Cooper's pretended ignorance of what Gilbert had done on the claim and lack of knowledge as to what residence a man had in such close proximity for a period of over five years is a circumstance in itself that brands Cooper with a guilty knowledge of the fraud.

THE DECREE.

It is contended by the appellant, that this action having been brought for the purpose of having cancelled a patent issued to the entryman of the land in question, the court could not make or enter any decree except a decree cancelling the patent or a decree dismissing the bill of complaint, and that more than six years having elapsed between the date the patent was issued and the date when the defendant Heaton was made a party to the action, the defendant Heaton in his answer having pleaded an interest in the lands and the statute of limitations, the court could not enter a decree cancelling the patent and could only enter a decree dismissing the bill of complaint.

In order to arrive at a proper understanding of the contention of the appellant it is necessary to review briefly the pleadings in this action and a portion of the evidence taken by the Examiner in Chancery.

In the original bill of complaint the appellant Cooper was named as the sole defendant. After alleging certain acts which constituted fraud on the part of the entryman, the bill of complaint alleged that the appellant Cooper knew, at the time he purchased the lands, of the fraud perpetrated by the entryman and purchased the land with full knowledge thereof. The bill of complaint was filed on December 7th, 1909. The appellant appeared and filed his answer to the bill of complaint on

March 29, 1910. In his answer the appellant, after certain making certain admissions and denials, alleges that before the commencement of the suit he had entered into a contract with one George Heaton, whereby he had agreed to sell said land to said George Heaton for a valuable consideration, and that the said Heaton, without any knowledge of any fraud on the part of the entryman, had purchased said land from the appellant Cooper, (Tr. p. 25). Upon the filing of the appellant's answer in which the purchase of the land by Heaton was alleged, the appellee obtained an order directing that George Heaton be made a party defendant, and permitting the appellee to amend its bill of complaint so as to state the case as to him, (Tr. p. 27). After obtaining this order the appellee amended its complaint by making certain interlineations in the original bill of complaint, by adding thereto an additional paragraph numbered "Eleventh" and by adding to the prayer a provision asking for the cancellation of the contract for the sale of said land referred to in the appellant's answer, (Tr. pp. 28-30). All of these amendments are indicated in the transcript by underscoring, so that it may be readily seen from the transcript the difference between the original bill of complaint as filed and as the same stood after these amendments were made, (Tr. pp. 2-17). After the making of this order and the amending of the bill of complaint, the defendant Heaton filed his answer on December 2nd, 1912, (Tr. pp. 33-39), in which, after making certain ad-

missions and denials, he alleged that on December 13th, 1909, the appellant and defendant entered into a contract for the sale of said land, together with other lands, by appellant to defendant, at \$5.70 an acre, and that on the 22nd day of April, 1911, the defendant Heaton had assigned, sold and transferred all of his interest in said contract to the Great Falls Farm Land Company, (Tr. pp. 37-39). To each of the answers of the appellant and defendant the appellee filed its replication, (Tr. pp. 26 and 40).

It will be seen from this review of the pleadings, that the action was originally commenced against the appellant Cooper for the purpose of cancelling a patent to certain lands, that after the appellant filed his answer alleging that he had parted with his title to said lands under a contract for the sale thereof to the defendant Heaton, the bill of complaint was amended so as to make Heaton a party defendant and so as to state a case as to him, and that thereupon the defendant Heaton filed his answer alleging that he had acquired an interest in said lands by virtue of having entered into a contract for the purchase thereof with the appellant Cooper, but that this defendant had thereafter parted with his interest in said lands by assigning and transferring said contract to the Great Falls Farm Land Company.

After the appellee had introduced its evidence in support of the allegations contained in its bill of complaint as amended, the appellant and defend-

ant introduced evidence in rebuttal thereof and also in support of the allegations in said answers that the appellant Cooper had entered into said contract to sell said land, together with other lands, to the defendant Heaton.

The appellant Cooper, testifying in his own behalf and that of the defendant Heaton, stated that he had sold said lands which he had purchased from the entryman, (Tr. p. 66). There was there-upon introduced in evidence a contract between the appellant Cooper and the defendant Heaton for the sale of said lands, together with other lands, by appellant to the defendant, (Tr. pp. 66 to 74). This was all of the evidence introduced to prove these allegations as to the contract and sale by the appellant to defendant.

From an examination of this contract, introduced in evidence, we find that on December 13th, 1909, four days after the filing of the bill of complaint against the appellant, the appellant and defendant Heaton entered into said contract; that this contract provides for the sale of 21,840 acres of land, including the land involved in the action, at the rate of \$5.70 an acre, payments to be extended over a period of years, the last payment becoming due October 1, 1914, and no deeds to be delivered until final payment made.

It will be observed that while the defendant Heaton in his answer alleged that he had parted with all of his interest in said contract by assigning and transferring the same to the Great Falls Farm

Land Company, no evidence whatever was introduced to show an assignment, so that as the evidence now stands we find that a contract was entered into between the appellant and defendant Heaton, and that Heaton still holds and retains said contract.

The court, in its decree, found that all of the allegations of the bill of complaint as to the fraud of the entryman were fully sustained by the proof; that the allegations of said bill of complaint that the appellant had full knowledge of such fraud at the time he purchased said land was fully sustained by the proof; that a contract for the sale of said land was entered into between the appellant Cooper and the defendant Heaton; that more than six years had elapsed between the date of issuance of patent and the date of the order directing the making of Heaton a party defendant to said action and that it was therefore impracticable to cancel said patent; that the value of said lands was \$5.70 an acre; (Tr. pp. 41-44).

All of these findings of the court are fully sustained by the proof. We have heretofore considered the evidence introduced to prove the fraud on the part of the entryman and the knowledge thereof by the appellant Cooper so that it is not necessary to examine this evidence here. The contract introduced in evidence supports the finding of the court as to the existence of the contract, while the date of the issuance of patent, as alleged in the bill of complaint, and the date of the order directing that Heaton be made a party defendant show

that more than six years elapsed between these dates and sustain this finding. Appellant contends, however, that there is no evidence as to the value of the land. We take it, that it is a principle of law that cannot be contradicted that all of the evidence must be taken and considered together, and that evidence introduced on the part of a defendant which tends to prove the plaintiff's case will be considered in connection with the plaintiff's case in exactly the same manner as though such evidence was introduced by the plaintiff. This being true we have in evidence the contract between the appellant and the defendant Heaton in which it is stated that this land, together with other lands, is to be paid for at the rate of \$5.70 an acre. Here then is direct proof introduced by the defendant showing the value of the lands, the value which the appellant was willing to accept and the defendant Heaton willing to pay. This evidence is sufficient to sustain the finding of the court as to the value of the lands.

But whatever the findings of the court may have been, the appellant strenuously contends that the action having been brought to cancel a patent the court could not enter a decree refusing to cancel the patent, but decreeing that the value of the land, with interest thereon, should be paid by appellant to the appellee, or if the appellee failed to pay the same that the defendant Heaton should pay the amount and withhold the same out of the purchase price under said contract remaining unpaid, and

that the appellee should have a lien on said land for such amount and foreclosure of such lien, and that such decree as entered is not sustained by the pleadings in the case.

In support of this contention the appellant cites a number of authorities. Upon an examination of these authorities we believe that the only authority cited which is at all in point is that of *Crocket vs. Lee*, 7 Wheat. 523, and appellant certainly must possess a most optimistic mind if he can obtain any satisfaction out of that particular decision. None of the other cases cited by appellant, when the subject matter of each particular case is considered, have any application to the case at bar.

At this time it is well to remind appellant that he alone is appealing from the decree entered in the lower court. The defendant Heaton seems to be well satisfied with the decree entered as he refused to join in this appeal and an order of severance was made (Tr. pp. 89-90), permitting the appellant to appeal.

We are free to confess that if evidence had been introduced by appellant and defendant showing that the defendant Heaton had transferred his interest in said contract to the Great Falls Farm Land Company, as he alleged in his answer, no decree could have been entered which would have been binding on either the defendant Heaton or on the Great Falls Land Company, but in the absence of such evidence does the appellant mean to contend that the court could not enter a decree which would be binding

on Heaton, particularly where, as in this case, he will suffer no injury whatever by reason thereof? The court found that fraud was committed by the entryman and that the appellant purchased the land with full knowledge of such fraud but that the defendant Heaton had no such knowledge. The decree is to the effect that the appellant Cooper, who became the owner of said land with knowledge of the fraud of the entryman, is the one who is to suffer. Heaton suffers no injury, he is simply directed to pay out of the amount he still owes the appellant Cooper the value of the lands with interest. It could make no difference to the defendant Heaton whether, in the absence of the decree, he should pay the balance of his purchase price to the appellant, or whether, the decree being entered, he pays the value of the land with interest to the appellee, retaining such amount out of the balance due the appellant under the contract. In either case he will pay the full purchase price for all of the lands covered by the contract, no more and no less. This being true the appellant then comes into this court on this appeal, with the findings of the court sustaining the allegations of the bill of complaint as to fraud on the part of the entryman and knowledge of such fraud by the appellant at the time he purchased the lands, and says, that because the action was an action to cancel the patent and the court found it impracticable so to do, he ought not to be required to make restitution, and that notwithstanding his participation in the fraud or the

fact that he has been benefitted thereby when he had knowledge thereof, he should be permitted to go hence without being compelled to suffer in any way for his own wrongful and unlawful acts. He comes into court with unclean hands and contends that even if he did have knowledge of the fraud of another whereby the appellee was injured and he was benefitted by that fraud he should be permitted to continue to enjoy such benefits and the appellee should have no recourse against him for such injury. The rules of equity which require that one who seeks equity must do equity and that one cannot come into a court of equity with unclean hands and ask for equity apply with all their force to this particular case. While the bill of complaint asks for the cancellation of the patent, yet, the decree as entered, while refusing to cancel the patent, requires nothing more than that equity and justice be done between the parties benefitted and injured by the fraud practiced by the entryman.

The prayer of the bill of complaint, as amended, asks for specific relief, the cancellation of the patent, the deed from the entryman to the appellant and the contract between appellant and defendant, and also asks for "such other and further relief in the premises as the circumstances of this cause may require, and as to this Honorable Court may seem meet and proper, and as shall be agreeable to equity and good conscience," (Tr. p. 16).

Under a prayer for general relief a court of equity will extend relief beyond the specific prayer

and not exactly in accordance with it and any relief that is agreeable to the case made by the pleadings can be granted under such a prayer, a court of equity having power to adapt its remedies to the circumstances of each particular case as developed by the pleadings and evidence, and in this case it was the duty of the court, after finding it was impracticable to cancel the patent, as prayed for in the specific prayer of the bill of complaint, by its decree to adopt and prescribe such remedies as would require justice to be done between the parties.

In the case of *Walden vs. Bodley*, 14 Peters 156, Justice McLean, in delivering the opinion of the court, said:

“But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court should adopt in giving relief. Under the general prayer for relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it.”

And in this case the court, having found it impracticable to cancel the patent, but having a case fairly made by the bill and answers, it was within its power to, by its decree, adopt such remedies as would do justice between the parties.

In *Lockhart vs. Leeds*, 195 U. S. 427, Justice Peckham, who delivered the opinion, said:

“Again it is alleged that the bill prays that the location of what is called the Washington Lode by the defendants be declared void, and that the plaintiff may have the possession of the claim, while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that under the prayer for general relief no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations of the bill do not justify such relief. All of the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because by reason of the facts, the location made by the defendants was a void location. Whether it was a void location or not, was a matter of law arising from the facts appearing in the bill. Those facts were not changed in the slightest degree, nor were any

inconsistent facts set up thereafter. The plaintiff now under his prayer for general relief contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees ex maleficio, for his benefit.”

“There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief, under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of *English vs. Foxhall*, 2 Pet. 595; *Boone vs. Chiles*, 10 Pet. 177; *Hobson vs. McArthur*, 16 Pet. 182; *Hayward vs. National Bank*, 96 U. S. 611; *Georgia vs. Stanton*, 6 Wall. 50, are not opposed to the views just stated.”

See also:

Watts vs. Waddle, 6 Pet. 389;

Ridings vs. Johnson, 128 U. S. 21;

Tayloe vs. Merchants, 9 How. 390;

Stevens vs. Gladding, 17 How. 447;

English vs. Foxhall, 2 Pet. 595;

Sage vs. Central Ry. Co., 99 U. S. 334;

Hepburn vs. Dunlop, 1 Wheat. 179;

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142
U. S. 396.

In Tyler vs. Savage, 143 U. S. 79, the court, speaking through Justice Peckham, said:

“The relief against Tyler was properly granted under the prayer of the bill for general relief. It was consonant with the facts set out in the bill as a ground of relief against Tyler personally and it was relief agreeable to the case made by the bill.”

The rule, that when a party shows by a bill of complaint facts which entitle such party to equitable relief such relief, as may be agreeable to the case made and the evidence in support thereof, may be granted under the prayer for general relief, is followed in the Federal courts and in most, if not all of the state courts.

“The special relief prayed in this bill is to quiet title or remove a cloud, but there is also a prayer for general relief. Upon the state of facts set forth by the bill I am of the opinion that plaintiff cannot have the special relief he prays, but rather would be entitled to a decree declaring him to be entitled to the legal estate and that the defendants hold the same in trust for his use and benefit, and for a conveyance

of the same to him, etc. But misapprehension by the plaintiff as to the special relief he is entitled to is no ground for demurrer where there is a prayer for general relief, for in such a case, if the bill sets out facts showing a right to relief the court will grant the proper relief under the general prayer.”

Patrick vs. Isenhardt, 20 Fed. 339;

Adams vs. Kehlor Mill. Co., 36 Fed. 212.

“Under our statutes and the practice which must prevail in courts whose law and equity powers are blended like ours, it would clearly appear that, in a case like the present, where plaintiffs have brought a civil action for the enforcement and protection of their rights, or the redress and prevention of their wrongs, it is the duty of the court to grant such relief as the complaint and the proof made thereunder, show them entitled to receive, without any distinction between law and equity. If they have a remedy at law let it be enforced; and if the remedy is an equitable one let it be applied in like manner.”

Leopold vs. Silverman, 7 Mont. 266.

“If the prayer of a bill in equity is for general as well as special relief the court has power to mold the decree to meet the case made on the record.”

Spevey vs. Frazer, 7 Ind. 661;

Pensacola & G. R. Ry. vs. Spratt, 12 Fla. 26.

“When the relief granted is not repugnant to the facts alleged and proved it is properly granted, altho not specifically prayed for, under the prayer for general relief.”

Penn vs. Folger (Ill.) 55 N. E. 192.

“A court of equity, having jurisdiction of the parties and the subject matter, will make its jurisdiction for complete relief.”

Ober vs. Gallagher, 93 U. S. 199.

“Equity, having obtained jurisdiction of the principal question, will proceed to give such complete relief as the justice and equity of the case may require.”

Hopburn vs. Dunlop, 1 Wheat. 179.

“A general prayer for such relief as may be just and equitable warrants the court in granting to the plaintiff such relief as the facts upon the trial justify.”

Finlayson vs. Peterson, (N. Dak.) 57 Am. St. Rep. 584.

See also:

Vol. 39 Cent. Dig. Plead. 143-144.

In this case the decree granted relief which was not inconsistent with the allegations of the bill of complaint. It is true that the decree did not order the patent cancelled, but it granted the appellee relief from the fraud practiced by the entryman by taking from the appellant, who knew of the

fraud, the benefits he derived therefrom, and giving such benefits to the appellee who was defrauded. That, to which the appellant was not entitled, was by the decree taken from him, and given to the appellee to reimburse it for the land out of which it had been defrauded. The relief granted by the decree was consistent with the case made by the pleadings, not the bill of complaint alone, but all of the pleadings in the case, and adjusted the equities between the parties. If the findings of the court are correct and the appellant knew of the fraud practiced upon the appellee then in equity and good conscience he ought not to be permitted to reap the benefits of such fraud, and all that the decree does is to take from him these benefits and give them to the party who was defrauded. The decree was properly entered and should be sustained.

In the event, however, that this court should find that the allegations set forth in the bill of complaint are not sufficient to sustain the decree, we submit, that in view of the evidence taken in the case and which does fully sustain the decree, this court should remand this case to the lower court with directions to so amend said bill of complaint that the same will conform to the evidence and sustain the decree.

“When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, may re-

mand the case to the court below for an amendment of the pleadings and such further proceedings as may be just.”

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142
U. S. 396;

Crocket vs. Lee, 7 Peters 522;

Watts vs. Waddle, 6 Pet. 389;

Walden vs. Bodley, 14 Pet. 156;

Neale vs. Neale, 9 Wall. 1;

Harden vs. Boyd, 113 U. S. 756;

Adams vs. Kehler Mill Co., 36 Fed. 212;

Jones vs. Meehan, 175 U. S. 1;

Liverpool etc. vs. Phenix Ins. Co., 129 U. S.
39.

Respectfully submitted,

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No. 2461

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK D. COOPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GEORGE HEATON,

Defendant not joining in appeal.

No. 2461.

APPELLANT'S REPLY BRIEF.

JAMES A. WALSH,

Solicitor for Appellant.

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I have received the brief of the learned counsel for the Appellee. I will not again discuss the facts in the case, but beg leave to briefly refer to the position taken by counsel with reference to the Judgment, as most of the brief is devoted to that subject.

It is unnecessary to cite further authorities upon the point that a decree must be within the issues presented by the pleadings and supported by

the evidence. A prayer for general relief does not give the Court authority to render a decree, not within the issues and the evidence. This proposition is supported by the authorities cited by the Appellee.

I beg leave to continue Counsel's quotation from Lockhart vs. Leeds.

“We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that, in substance, is what is held in the above cases.”

And his quotation from Tyler vs. Savage says that the relief granted “Was consonant with the facts set out in the bill and agreeable to the case made by the bill.”

It is unnecessary to further discuss this feature of the case. The learned counsel for the appellee realizes the force of these authorities and enters a plea of confession and avoidance by contending that the Court may remand the case to the lower Court to amend the pleadings, and for such other proceedings as may be just. This is not a case in which that may be done.

It is true that in some equity cases a bill may be so framed that alternative relief may be granted. The relief granted must be within the rules and principles of equity. A bill cannot be framed to demand equitable relief, and as an alternative to demand legal relief or relief that could be obtained in an action at law.

When the Government is dealing with its citizens or others under contracts, and in litigation affecting property rights, it is bound by the same rules as an individual. It has no greater rights. It is not acting in its sovereign capacity, but acting in the same right as an individual would.

Bostwick vs. U. S., 94 U. S. 53;
In re Smoots case, 15 Wallace, 36;
Amoskeag Mfg. Co., 17 Wallace, 592.

In matters relating to land, the Government has no greater rights than any other land proprietor, and in all suits affecting the same is bound by the same rules. It is elementary that if a party claims that he was induced to enter into a contract, or to part with property by fraud or through fraudulent representations, he has his choice of remedies, to rescind the contract, or affirm the contract and sue for the value of the property obtained. One is a suit in equity, the other is an action at law. He must elect whether he will rescind the contract, or affirm it and sue for the value of the property obtained, but he cannot do both. The Government, therefore, must elect to bring a suit to cancel the patent, or to affirm the patent, and sue for the value of the land. It cannot, in the same action, ask to rescind the contract, that is to cancel the patent, and ask to recover the value of the land in case the contract cannot be rescinded; or, in other words, that the patent cannot be cancelled. This is elementary. Having elected to bring an action to

cancel the patent, it is bound by its election, and cannot then ask to recover the value of the land because the patent cannot be cancelled.

Peters vs. Bain, 133 U. S. 670;

Rob vs. Vos, 155 U. S. 13;

Wesley vs. Diamond, 109 Pac. 524;

Wilson vs. Cattle Co., 73 Fed. 994; 20 C. C. A. 241;

Wheeler vs. Dun, 22. Pac. 827;

Bank vs. Board of Commissioners, 60 Pac. 1062;

Gaffney vs. Megrath, 63 Pac. 520.

An amendment cannot be allowed that will change the nature of the cause of action from a suit in equity to an action at law, or from an action at law to a suit in equity.

A suit to cancel a patent is a suit in equity. An action to recover the value of the land would be an action at law, and a Court of equity would not have jurisdiction.

U. S. vs. Bitter Root Development Co., 200 U. S. 451.

I respectfully submit that the judgment should be reversed and the action dismissed, and that the pleadings cannot be amended as suggested by Counsel for the Appellee.

Respectfully submitted,

JAMES A. WALSH,

Solicitor for Appellant.

